

REPORTER'S RECORD

VOLUME 50 OF 65 VOLUMES

74145

TRIAL COURT CAUSE NO. F00-02424-NM

THE STATE OF TEXAS : IN THE DISTRICT COURT
VS. : DALLAS COUNTY, TEXAS
JEDIDIAH ISAAC MURPHY : 194TH JUDICIAL DISTRICT

TRIAL ON THE MERITS BY JURY

FILED IN
COURT OF CRIMINAL APPEALS

DEC 5 2001

A P P E A R A N C E S:

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FOR THE DEFENDANT.

On the ^ day of ^, 2001, the following proceedings
came on to be heard in the above-entitled and numbered cause
before the Honorable F. Harold Entz, Jr., Judge presiding,
held in Dallas, Dallas County, Texas:

Proceedings reported by machine shorthand, computer
assisted transcription.

DARLINE W. LABAR, OFFICIAL REPORTER

ORIGINAL

1 INDEX VOLUME 50

2	June 7th, 2001	PAGE	VOL.
3	Proceedings.....	2	50
4	Reporter's Certificate.....	148	50

5

6 CHRONOLOGICAL WITNESS INDEX

7		DIRECT	CROSS	VD	VOL.
8	MARY ERIN MILLER	2			50
9	GREG DAVIS	8			50
10	TRESHOD TARRANT	25, 59	57		50
11	JASON BONHAM	62	79		50
12	EDWARD HUESKE	87			50
13	EDWARD HUESKE	90	95		50
14	DR. NIZAM PEERWANI	100			50
15	DR. NIZAM PEERWANI	104	113		50
16	DR. WILLIAM VANDIVER	122	128		50

17

18 ALPHABETICAL WITNESS INDEX

19		DIRECT	CROSS	VD	VOL.
20	JASON BONHAM	62	79		50
21	GREG DAVIS	8			50
22	EDWARD HUESKE	87			50
23	EDWARD HUESKE	90	95		50
24	MARY ERIN MILLER	2			50
25	DR. NIZAM PEERWANI	100			50

1	DR. NIZAM PEERWANI	104	113	50
2	TRESHOD TARRANT	25, 59	57	50
3	DR. WILLIAM VANDIVER	122	128	50

EXHIBIT INDEX

6	STATE'S		OFFERED	ADMITTED	VOL.
7	126	Autopsy Photo	117	117	50
8	DEFENDANT'S		OFFERED	ADMITTED	VOL.
9	6A	Handwritten Note	10	10	50
10	6B	Handwritten Note	10	10	50
11	6C	Handwritten Note	10	10	50
12	10	Dr. Krusz Records	25	25	50

P R O C E E D I N G S

THE COURT: Ms. Balido, are you proceed to proceed with the hearing that commenced yesterday, ma'am?

MS. BALIDO: Yes, Judge, but my first witness just went outside, Ms. Miller.

THE COURT: All right. Let the record reflect this hearing is conducted in open court, outside the presence and hearing of the impaneled jury and the alternate.

The accused, Jedidiah Isaac Murphy, will be in court at all times during the hearing unless I dictate the contrary into the record.

Ms. Miller, you have been called as a witness in this hearing. If you'd have a seat.

Ms. Miller is an Assistant District Attorney in Dallas County, Chief Prosecutor, 194th District Court. As an officer of the court, the Court will not impose the obligation of an oath.

Ms. Balido.

MARY ERIN MILLER

was called as a witness by the Defendant and, after having the oath waived by the Court, testified as follows:

Direct Examination

By Ms. Balido:

Q. Can you please state your name for the record?

A. Mary Erin Miller.

1 Q. Ms. Miller, you're currently employed as a Dallas
2 County Assistant District Attorney; is that correct?

3 A. Yes.

4 Q. And you are the Chief Prosecutor in the 194th
5 Judicial District Court?

6 A. Yes.

7 Q. And you are currently in trial in the case of the
8 State of Texas versus Jedidiah Isaac Murphy?

9 A. Yes.

10 Q. In regard to your trial preparation, when did you
11 become aware that there was a police report or actually a
12 crime scene search report regarding the attempted suicide of
13 Jedidiah Isaac Murphy?

14 A. I believe it was either last week or the end of the
15 week before.

16 Q. And is it your understanding at this point that
17 Jedidiah Isaac Murphy is not charged with the Texas Penal
18 Code offense of attempted suicide?

19 A. Not to my knowledge.

20 Q. It's not filed in this court?

21 A. No.

22 Q. When did you become aware that there were items
23 seized in relation to Mr. Murphy's attempted suicide?

24 A. The day I spoke with Sergeant Lockman and Deputy
25 Rainy, and I forget the other deputy's name.

1 Q. And it was your understanding at that time that they
2 had seized property from his cell in regard to the attempted
3 suicide; is that correct?

4 A. Property in the form of papers and the razor blade
5 that was used.

6 Q. Okay. Did you then seek a search warrant for that
7 property?

8 A. No.

9 Q. At any time has a search warrant been issued for
10 that property, as far as you know?

11 A. Not to my knowledge.

12 Q. And what did you do after you found out that they
13 had seized property in regard to this attempted suicide?

14 A. I notified Mr. Davis since he's lead counsel, asked
15 him if he wanted to go over them or if he wanted me to go
16 over them, and then contacted first someone in the Capers
17 Division of the Sheriff's Office to find out where they were,
18 and then talked with Ray LePere who is the deputy in charge
19 of the Sheriff's property room.

20 Q. Okay. And when you say Capers, just so the record
21 will be clear, that's the Crimes Against Persons Unit of the
22 sheriff's investigative office?

23 A. Yes.

24 Q. And then after talking with Mr. LePere, did he bring
25 you a packet which we have entered into the record as --

1 MS. BALIDO: I'm not sure what the number is,
2 Judge.

3 THE REPORTER: Defendant's 6.

4 Q. (By Ms. Balido) Defendant's Exhibit Number 6?

5 A. No, he did not.

6 Q. Okay. When did you receive that?

7 A. Mr. Davis and I went down to the Sheriff's property
8 room and the packet never left the property room or Mr.
9 LaPere's control. We sat at a table within the Sheriff's
10 property room, and there was another female Sheriff's deputy
11 who also works down there, but I do not know her name. And
12 Mr. LePere -- and the room is not even -- not even half the
13 size of the front half of this courtroom. And all four
14 people were present at all times, and Mr. LePere sat at the
15 table with us as we looked at the paperwork in there. And
16 then if one of the papers needed to be copied, he gave it to
17 the female Sheriff's deputy and she copied it. And then they
18 gave us the copy.

19 Q. Did you ever see any sort of release executed by
20 Jedidiah Isaac Murphy releasing his property to be viewed by
21 any person?

22 A. No.

23 Q. That wasn't part of any kind of paperwork that you
24 saw?

25 A. No.

1 Q. Can you tell me if it is -- to your knowledge, is
2 the Sheriff's office property room accessible to the public?

3 A. No.

4 Q. You have to go through a certain -- where is that
5 located? Actually in the jail, or is it down on the first
6 floor of this building?

7 A. It's down actually in the parking -- the private
8 Judges' parking garage of this building. And Mr. LePere met
9 us out by the back elevator and let us in to that secured
10 area. There -- to my understanding, there are at least two
11 different secured doors that you have to have a key to get
12 into.

13 Q. And you don't have that key, and no one as part of
14 the District Attorneys Office has that key, but it's -- well,
15 first; is that correct? As far as you know?

16 A. As far as I know, no one with the D.A.'s office has
17 a key to that.

18 Q. And you could only access that area with LePere's
19 ability to have the key or whoever was from the Sheriff's
20 Department to escort you around?

21 A. Well, no. The Sheriff's -- my understanding is the
22 District Clerk and the County Clerk also have evidence
23 lockers down there in the larger secured area. So I guess
24 some of the District Clerks or County Clerk evidence
25 personnel have keys to get into the large area. And then I

1 guess those individual agencies would have the separate keys
2 to get into their own property rooms within the larger
3 secured area.

4 Q. You said that you viewed everything that was in the
5 packet; is that correct or not correct?

6 A. No, I did not view everything that was in the
7 packet. Between Mr. Davis and I, everything in the packet
8 was viewed. I only viewed some of the defendant's
9 discipleship papers, to make sure there was nothing else in
10 that and I looked at a couple of the private letters. I did
11 not look at or read any of the -- I believe it was three-page
12 handwritten notes by the defendant.

13 Q. Okay. That were addressed to my lawyers or to Jane
14 and Mike, you didn't look at any of that?

15 A. I did not.

16 Q. Okay. Ms. Miller, you've been an Assistant District
17 Attorney in Dallas County for how long?

18 A. 13 and a half years.

19 Q. And is it the regular practice of the Sheriff's
20 Department to -- the Dallas Sheriff's Department to turn over
21 papers that are seized in an attempted suicide attempt to the
22 District Attorneys Office, as far as you know?

23 A. I have never in my 13 and a half years dealt with an
24 attempted suicide so I have no knowledge. This is the first
25 time I have ever dealt with one.

1 Q. Okay.

2 MS. BALIDO: I'll pass the witness, Judge.

3 MR. DAVIS: No questions.

4 THE COURT: Ms. Balido, you may continue.

5 MS. BALIDO: We call Mr. Davis to the stand.

6 THE COURT: Again, Mr. Davis is a Senior
7 Prosecutor with the Dallas District Attorneys Office, lead
8 prosecutor for the State in this matter, officer of the
9 court, will not impose the obligation of the oath.

10 Ms. Balido, you may proceed.

11 GREG DAVIS

12 was called as a witness by the Defendant and, after having
13 the oath waived by the Court, testified as follows:

14 Direct Examination

15 By Ms. Balido:

16 Q. Can you please state your name for the record?

17 A. My name is Greg Davis.

18 Q. And, Mr. Davis, I know you have served as an
19 Assistant District Attorney, went out into private practice,
20 and come back. What is your total service with the District
21 Attorney's Office?

22 A. Let's see, I was in the District Attorneys from 1977
23 to 1982, and I've been back in the office since October of
24 1992.

25 Q. And you are lead counsel on the case of the State of

1 Texas versus Jedidiah Isaac Murphy?

2 A. Yes.

3 Q. When was it that you were first aware that there
4 were some items seized in Mr. Murphy's attempted suicide?

5 A. When Ms. Miller told me.

6 Q. And what did you decide to do once you learned that
7 information?

8 A. Go down and look at them.

9 Q. And in those items -- well, which items did you look
10 at?

11 A. I looked at all the items in the packet.

12 Q. And were some of those items three handwritten pages
13 that on the first page started out to Jane and Mike?

14 A. They were three handwritten pages. I don't know if
15 the first page was addressed to Jane and Mike. I don't
16 remember the orders that those three papers were in in the
17 packet.

18 MS. BALIDO: Judge, may I retrieve those
19 papers, please.

20 THE COURT: You may.

21 (Defendant's Exhibit No. 6A, 6B, and 6C marked)

22 Q. (By Ms. Balido) Mr. Davis, I'm showing you what's
23 been marked for identification as Defendant's Exhibits 6A,
24 6B, 6C, and I ask if you recognize these papers.

25 A. I think these are the three handwritten notes that I

1 reviewed with Ms. Miller.

2 Q. And you just saw me take them out of Defendant's
3 Exhibit Number 6; is that correct?

4 A. Yes, I did.

5 MS. BALIDO: Judge, for the purposes of this
6 hearing, we'd offer 6A, B, and C into the record.

7 (Defendant's Exhibit No. 6A, 6B, and 6C offered)

8 THE COURT: Admitted.

9 (Defendant's Exhibit No. 6A, 6B, and 6C admitted)

10 Q. (By Ms. Balido) Ms. Davis, can you explain to the
11 Court what you did in regard to reviewing each sheet?

12 A. You're talking about the three that you have in your
13 hand?

14 Q. Yes.

15 A. I looked over them.

16 Q. And did you read them?

17 A. I read portions of them, yes.

18 Q. And did you make copies of them?

19 A. No.

20 Q. And Defendant's Exhibit Number 6A, that is -- at the
21 top it says "Michael and Jane," and then, "sorry if I've
22 offended you by using your first name"; is that correct?

23 A. Yes.

24 Q. And you knew at that time that the lawyers in this
25 case were named Michael Byck and Jane Roden, is that -- I'm

1 sorry, Jane Little; is that correct?

2 A. Yes.

3 Q. And did this look like to you that it -- and then on
4 the back of 6A it's signed, "Sincerely, Jim Ed"; is that
5 correct?

6 A. Yes.

7 Q. And through your investigation of this case is Jim
8 Ed one of the names of -- or one of the names that the
9 defendant, Jedidiah Isaac Murphy, has used in his life?

10 A. Yes.

11 Q. Did you know it to be -- did you think at that point
12 that it looked like a letter from Jedidiah Isaac Murphy?

13 A. I wasn't sure what it was because on one of the
14 other attached pages I believe there's a date that refers
15 back to October of 2000. There was no envelope accompanying
16 those three pages, either, so I didn't know what to make of
17 it at that time.

18 Q. Okay. So -- so are you saying that when you
19 originally looked at this that State's -- I mean, excuse me,
20 Defendant's Exhibit Number 6A, 6B, and 6C were attached?

21 A. No, they weren't.

22 Q. Okay. So they were separate sheets; is that
23 correct?

24 A. Yes.

25 Q. Okay. And so looking at Defendant's Exhibit 6A, you

1 did not think that that was a letter to his attorneys?

2 A. I didn't form any conclusion at that time.

3 Q. And Defendant's Exhibit 6B, the first line of that
4 is "questions for my lawyers"; is that correct?

5 A. Yes.

6 Q. And there are a certain number of paragraphs that
7 are numbered one through six; is that correct?

8 A. Yes.

9 Q. And that's also signed Jim Ed; is that correct?

10 A. Yes.

11 Q. And additionally Defendant's Exhibit C, that is the
12 paper that you were talking about that had a date of
13 10-21-2000?

14 A. That's right.

15 Q. Okay. And on the back of Defendant's Exhibit 6C,
16 does it have a notation?

17 A. Yes.

18 Q. And what is that notation?

19 A. "To my lawyers, please help me with the problems I'm
20 having with the staff, sees me only as a monster."

21 Q. Yesterday, Mr. Davis, you cross-examined a number
22 of -- well, you examined a number of the State's witnesses in
23 regard to hallucinations; is that correct?

24 A. Yes.

25 Q. Can you point out -- outside these letters that you

1 said that you reviewed, can you point out to any place in
2 your investigation that made mention of hallucinations?

3 A. I can point to several instances.

4 Q. Will you do so?

5 A. First of all, the defendant's jail records. His
6 medical records, I've reviewed those. When he was first
7 booked into the Dallas County Jail, he made numerous
8 complaints of hallucinations. I've also reviewed numerous
9 medical records from the defendant's past, various
10 institutions, including Glen Oaks Hospital in Greenville,
11 Texas; the Andrews Center in Tyler, Texas; Timberlawn
12 Psychiatric Hospital in Dallas, Texas. And my recollection
13 is in all of those documents he's made complaints of
14 hallucinations.

15 Q. And, Mr. Davis, yesterday you also talked to or
16 examined a number of witnesses regarding their knowledge or
17 hearing of any alter ego or split personality from the
18 defendant; is that correct?

19 A. Yes.

20 Q. And can you tell what source, absent these letters
21 that you reviewed, that you came across that information?

22 A. Glen Oaks Hospital records.

23 Q. And you know that specifically?

24 A. Yes.

25 Q. Can you state on the record for us, sir, if you used

1 any information gained on -- from those letters in your
2 preparation for trial at all?

3 A. No, I haven't.

4 Q. Did you use any information found in those -- that
5 you found in those letters in your trial strategy?

6 A. No.

7 Q. Did you use that information found in those letters
8 in any way at all?

9 A. No.

10 Q. Is it your testimony that looking at those letters
11 you did not know them to be letters to his lawyers?

12 A. My answer again is that I didn't form any
13 conclusion. My suspicions were that they were notes he had
14 written for himself. Having represented defendants in the
15 past, I think it's a common practice for inmates to write
16 notes to themselves. Based on the date on that letter or
17 that three-set handwritten notes, I didn't make any
18 conclusion whatsoever.

19 Q. There are also some entries in those letters, aren't
20 there, Mr. Davis, regarding the problems that the defendant
21 saw with the investigative -- the head investigator Myers'
22 testimony at the examining trial?

23 A. I believe there are.

24 Q. Did you form any trial strategy regarding those
25 issues of fact that the defendant wrote down?

1 A. No.

2 Q. Did you talk with Detective Myers about any
3 information that that might -- that -- or talk about
4 preparing for those sorts of things on cross-examination?

5 A. No.

6 Q. At any time did you attempt to contact Mr. Byck or
7 Mr. Little (sic) and explain that you had viewed materials
8 that you thought might be notes for -- for them from their
9 client?

10 A. No.

11 Q. So it's your testimony you made no use at all of
12 this information at any part in your prosecution of Jedidiah
13 Isaac Murphy?

14 A. Yes.

15 MS. BALIDO: Pass the witness.

16 MS. MILLER: No questions.

17 THE COURT: Anything further you wish to put
18 on the record in your own behalf?

19 MR. DAVIS: No, Your Honor.

20 MS. BALIDO: Judge, I need to check and see if
21 my other witnesses are here.

22 (Brief recess.)

23 MS. BALIDO: Judge --

24 THE COURT: I'm inclined when they get here to
25 swear them in and make them post a bond until they testify.

1 I am sick and tired of the Dallas County Sheriff's
2 Department's lack of cooperation with the court in this
3 particular matter, and I personally am going to take it up
4 with Jim Bowles and tell him just exactly what I think about
5 some of his senior officials and their lack of cooperation.
6 This is extremely unprofessional.

7 Go ahead.

8 MS. BALIDO: Judge, the general rule set down
9 by the U.S. Supreme Court which the Court has cited to us in
10 court is Hudson versus Palmer where the Supreme Court said
11 that prisoners do not have an expectation of privacy with
12 respect to searches motivated by institutional security
13 concerns and performed by prison officials. However, Judge,
14 the Federal Court of the Southern District of New York in
15 1999, citing U.S. versus Cohen, 796 Federal 2d 20 -- page 20
16 and pages 22 to 23, which is a Second District case in 1986,
17 said that when a search -- and here we're not saying it's the
18 search itself but actually the seizure, and we argue the
19 subsequent search by the Dallas County District Attorney's
20 Office, a separate police agency. Okay. The seizure by the
21 Dallas County District Attorney's Office and its use at trial
22 other than the institutional security concerns of the Dallas
23 Sheriff's Department, okay -- their seizure for that purpose,
24 is performed or initiated by law enforcement officials other
25 than those in charge of prison or jail and is unrelated to

1 institutional security concerns, the Court said a prisoner
2 has a reasonable expectations of privacy with respect to that
3 search. Okay. That's what those cases said. And even in
4 the -- and the New York case is Rollack -- US versus Rollack,
5 R-o-l-l-a-c-k, 90 Federal Supplement 2d 263.

6 Now, when the Supreme Court took up the Rollack
7 case -- the U.S. Supreme Court took that case up, it did not
8 address the search of the jail cell issue per se, because
9 they -- because the federal court suppressed the jail search
10 in regard to papers found inside the cell, but granted the
11 search in regard to mail, saying that those were two
12 different things. And also the Rollack case had the added
13 protection of actually having a warrant, a Judge signed a
14 warrant to go in there and seize those items which is clear
15 from the record did not happen here.

16 Basically what the case -- the Rollack case and
17 again citing U.S. versus Cohen, the Second Circuit case, that
18 government contended security concerns -- because, you know,
19 jails have an interest in preventing inmates from engaging in
20 criminal activity, here a suicide, and also they are
21 liability situation as well, to interpret it or extrapolate
22 it and to extend security to encompass everything that could
23 be deemed a criminal investigation would -- would render that
24 term meaningless because basically any criminal investigation
25 can be characterized in such a manner.

1 Thirdly, Judge, what Cohen says, U.S. versus Cohen,
2 that if it's not security and if it's -- if it's not for
3 security purposes and if it's not the jail or prison
4 officials doing it in pursuant to those, then therefore it's
5 not immune from Fourth Amendment consideration. That's what
6 the Cohen case says. And this case turning the information
7 over to the District Attorney was not related to the
8 prosecution of any matter, was not related to turning it over
9 for liability purposes to the Civil Section of the District
10 Attorneys Office, but rather turning it over to the District
11 Attorneys Office for use in the capital murder trial of
12 Jedidiah Isaac Murphy, and that's why we think that that
13 seizure of the property is illegal.

14 THE COURT: How can you show harm?

15 MS. BALIDO: The harm basically, Judge, is
16 that the use of -- of this man's property -- and -- and we
17 would say that also --

18 THE COURT: Can you show they used it
19 independent of outside sources?

20 MS. BALIDO: Judge, we would say that the
21 attorney-client privilege is sacrosanct and -- and I
22 understand what he testified to and I also understand -- but
23 I understand that those issues were also brought up and --
24 and in cross-examination, and I would say that the harm is
25 basically that his expectation of privacy, that these things

1 were -- were taken from his cell, and if the Sheriff's
2 Department gets here, I believe that the policy will be that
3 he would be able to release it back to himself if he had sent
4 a kite in, that without the permission of Mr. Murphy to give
5 the State that, that they didn't have any -- they didn't have
6 any recognizable State action. And -- and the harm is
7 actually the invasion of his privacy in itself. And --

8 THE COURT: Did they have -- did they not have
9 a legitimate right to examine the papers in light of the
10 conduct of Mr. Murphy which occasioned his being taken to
11 Parkland as a potential suicide?

12 MS. BALIDO: Judge, they might have. They
13 might have. And if they thought that they had a legitimate
14 right to it, they could have gone to a Judge and asked for a
15 warrant. What my problem is, is this unchecked ability of
16 the District Attorneys Office to go to the Sheriff's
17 Department which is -- and be granted access to property that
18 I would have to use a subpoena for, that they didn't -- they
19 did not use a subpoena for, they did not -- they did not have
20 a warrant for. That -- that is the problem right there.
21 They may have had a right to it. We're just saying they
22 shouldn't have gotten it without a warrant. And the
23 warrantless search has no -- you know, they don't have any --
24 they don't qualify with any exception. There wasn't
25 indigency -- exigency certainly. And so there's no exception

1 to the warrantless search requirement that would allow them
2 access to those materials.

3 And finally, Judge, we'd make this -- we're basing
4 this -- our theory on the seizure actually of the D.A.'s is
5 the problem based on United States versus Brett, which is 412
6 Federal 2d 401, a Fifth Circuit case in 1969, where the
7 situation was that when a prisoner was booked into jail and
8 his things were seized at that time, the Court said that was
9 okay. I think that's what the cases say, that everything is
10 okay. But three days later went back and took a second look
11 at the property and it was that second seizure or second look
12 or search of the property which was the -- which is when they
13 found the heroin. And the Fifth Circuit in Brett said that
14 the second search was more extensive than the first one
15 performed at the arrest and the inventory which is what we
16 would say -- is the State's looking at it for different
17 purposes than just the attempted suicide would be a more
18 extensive search. Also, that the plain view -- that it was
19 in plain view of the property room was not -- was not a good
20 argument. And third, that no exigent circumstances warranted
21 the disposal of the warrant requirement. And that's what
22 we're saying, that they should have had a warrant.

23 Judge, we bring this motion based on the United
24 States Federal Constitution, the 4th and 14th Amendments to
25 the United States Constitution, Article 1, Section 9, 10, 13,

1 and 19 of the Texas Constitution, which includes the due
2 course of law provisions in the Texas Constitution, and an
3 argument that the Fourth Amendment rights that are mirrored
4 in Article 1, Section 9, of the Texas Constitution are more
5 expansive than those granted by the Fourth Amendment. And we
6 would ask you to look at that based on Heightman versus
7 State.

8 To be honest with the Court, there is a similar but
9 not fact -- I mean, not the same facts case which is Oles,
10 O-l-e-s, versus the State of Texas, which is at 993 Southwest
11 2d 103, Texas Court of Criminal Appeals 1999, which they
12 allowed a search and found that Brett was not persuasive, but
13 we think that the facts in this case are more persuasive
14 based on what you know up to this point and what you'll
15 hopefully know later about the policies of the Texas -- I
16 mean, of the Dallas County Sheriff's Department.

17 THE COURT: Having heard argument of the
18 defense in regard to this issue, the Court finds itself
19 obligated by the Constitutional mandate, United States
20 Supreme Court Hudson v. Palmer 104 Supreme Court 3194,
21 notwithstanding the fact that the Court even if the facts and
22 circumstances of this incident are in distinction or can be
23 altered on a fact situation from Hudson v. Palmer case, I
24 find that there was beyond a reasonable doubt no harm done by
25 the perusal by the State of the pages allegedly written by

1 Jedidiah Isaac Murphy. In no way do I wish to violate and
2 necessarily condone the actions of the State in reading this
3 particular material, however I find under the circumstances
4 the reading of the material has occasioned no harm beyond any
5 doubt to the defense to this point.

6 MS. BALIDO: Judge, implicit in your finding,
7 can I have a finding of fact as to whether or not you believe
8 Defendant's Exhibit Number 6A, B, and C, are privileged under
9 the attorney-client privilege?

10 THE COURT: The Court will hold its decision
11 until later to determine whether or not I believe that to be
12 the case.

13 MS. BALIDO: One other matter to put on the
14 record before the jury comes in, Judge.

15 THE COURT: Yes, sir (sic).

16 MS. BALIDO: At this time Jedidiah Isaac
17 Murphy in Cause Number F00-02424-M, moves this Court to
18 direct a verdict of not guilty for the following grounds:
19 First, there is no evidence upon which reasonable minds could
20 differ that this offense, being the murder or capital
21 murder -- or actually that the murder of Bertie Lee
22 Cunningham occurred in Dallas County, Texas.

23 Additionally, I would believe that there was no
24 evidence to show that the abduction or the robbery which are
25 the underlying aggravating circumstances of this capital

1 murder, there is no evidence to believe that those events
2 happened in Dallas County, Texas. The State must do
3 something other than say, well, there's no evidence to show
4 that it didn't happen in Dallas County, Texas. And we would
5 say that -- that they have not sustained even a prima facie
6 case on that basis.

7 In addition to that, Judge, they have not showed or
8 made a prima facie case that -- that venue is proper in the
9 194th Judicial -- Judicial District Court of Dallas County,
10 Texas, based on the reasons they haven't shown that the
11 complainant was shot in Dallas County, Texas, or that she
12 died in Dallas County, Texas. And for those reasons we would
13 show -- that's our first ground -- that the verdict should be
14 directed for the defense of not guilty.

15 Our second ground is that the State has failed to
16 prove beyond a reasonable doubt that the death was not an
17 accident and that reasonable minds could not differ at that
18 time -- and we -- and we believe they have not shown that the
19 death cannot be an accident. That's our second ground.

20 The third ground is they have not proved beyond --
21 or made a prima facie case that Mr. Murphy, if he did cause
22 the death of Bertie Lee Cunningham, did so with the specific
23 intent to kill her. And along also that grounds that he
24 intentionally caused the death of Bertie Lee Cunningham.

25 And, Judge, we would stand on our motion as read

1 into the record.

2 THE COURT: The Motion for Instructed Verdict
3 is denied with particularity as relates to Issue Number 1. I
4 call defense counsel's attention to Articles 13.17 and 13.19
5 of the Texas Code of Criminal Procedure.

6 Sheriff, would you bring in the jury, please.

7 Defense anticipate making an opening statement or
8 not?

9 MR. BYCK: No, Your Honor.

10 MS. BALIDO: I'll get my first witness.

11 MS. MILLER: Judge, 13.08 also we believe
12 applies.

13 THE COURT: 13.08 as it relates to that. I
14 concur.

15 THE BAILIFF: All rise.

16 (Jury returned to courtroom.)

17 THE COURT: Let the record reflect the jury is
18 returning to the courtroom at this time.

19 Jurors may be seated.

20 Mr. Murphy, counsel, visitors in the gallery, you
21 may be seated.

22 State having rested, the defense may proceed.

23 MR. BYCK: Your Honor, we would offer as
24 Defendant's Exhibit -- to be named later by the court
25 reporter --

1 THE REPORTER: 10.

2 MR. BYCK: -- Defendant's Exhibit 10, a
3 initial neurological investigation and various original notes
4 of the -- of the treatment -- it really wasn't treatment, the
5 examination conducted by Dr. John Claude Krusz, K-r-u-s-z.
6 And we offer these into evidence for all purposes.

7 (Defendant's Exhibit No. 10 offered)

8 MR. DAVIS: No objection.

9 THE COURT: They're admitted.

10 (Defendant's Exhibit No. 10 admitted)

11 MR. BYCK: And we would ask permission to
12 publish this at a later time.

13 MS. BALIDO: Your Honor, at this time we now
14 call Treshod Tarrant to the stand.

15 (Witness brought forward.)

16 THE COURT: Mr. Tarrant, I ask that you retake
17 the stand to my left, sir.

18 You may proceed.

19 MS. BALIDO: Thank you, Judge.

20 TRESHOD TARRANT

21 was called as a witness by the Defendant and, after having
22 been first duly sworn, testified as follows:

23 Direct Examination

24 By Ms. Balido:

25 Q. Could you please state your name for the record?

1 A. Treshod Montrell Tarrant.

2 Q. And you're the same Treshod Montrell Tarrant that
3 testified earlier in this case; is that correct?

4 A. Yes, ma'am.

5 Q. Okay. Mr. Tarrant, you and I have never spoken
6 before, have we?

7 A. Out in the hall.

8 Q. Okay. When I said come on in?

9 A. Yes, ma'am.

10 Q. Okay. I want to ask you a couple of questions
11 about -- about what -- well, about the first time that you
12 saw Mr. Murphy out there at your grandmother's house. Okay?

13 A. Okay.

14 Q. And that was before your parole meeting?

15 A. Yes, ma'am.

16 Q. Okay. Can you tell us what he looked like when he
17 first showed up there?

18 A. Well, when he first showed up, he was -- appeared to
19 be somewhat normal, you know, Jim just saying hi. He hadn't
20 seen me in a long time. As we talked and as the day
21 progressed after I got back from reporting, I noticed he was
22 kind of -- I don't know, starry-eyed like.

23 Q. Kind of glassy-eyed?

24 A. Glassy-eyed. And I asked him what was -- you know,
25 what was wrong with him. And he told me, you know, he had

1 been drinking a couple of days and just seemed starry-eyed
2 kind of.

3 Q. Okay. Did you -- did you find any or see any
4 evidence that he might have been drinking? I'm talking about
5 beer cans and that kind of stuff?

6 A. Yes, ma'am. When I got in the car with him, it was
7 18-pack of Bud Light in the car and he probably had about
8 five beers left in it.

9 Q. Okay. So that would mean that 13 of them were
10 missing?

11 A. Yes, ma'am. And I drank the majority of them.

12 Q. Okay. Well, wait, hold on a second. This is when
13 I'm talking about the first -- the first time that you saw
14 him, did you see anything in the car -- oh, I'm sorry, are
15 you talking about that you drank the majority of the five
16 afterwards?

17 A. Afterwards, yes, ma'am.

18 Q. Okay. Did he seem upset?

19 A. No. He seemed kind of just sad like. He wasn't
20 upset as in aggravated and, you know, mad, but he seemed just
21 like, I don't know, just like he wasn't into what we was
22 doing, but yet he was trying to be.

23 Q. Okay. Kind of preoccupied?

24 A. Uh-huh.

25 Q. Okay. And sad?

1 A. A little bit.

2 Q. But he never got so sad that he cried?

3 A. No, ma'am.

4 Q. So then you went off and reported and you came back
5 to your house and he was still there; is that right?

6 A. No, I seen him up town, we met, and then he followed
7 me back to the house.

8 Q. Okay. And what did y'all do once y'all got right
9 back to the house?

10 A. Talked a little bit more, told my granny we was
11 fixing to leave, and shortly we left.

12 Q. Okay.

13 A. Headed to Terrell.

14 Q. Okay. Did -- tell me a little bit about your
15 granny. She obviously doesn't like alcohol in the house.

16 A. No, ma'am.

17 Q. Okay. And she doesn't -- she obviously -- certainly
18 doesn't like drugs in the house.

19 A. No, ma'am.

20 Q. Okay. So do you usually, if you're drinking beer
21 around the house or whatever, do you go to a different
22 location or down to the park or --

23 A. Outside, you know, beside the house, you know, kind
24 of over to the side under like a little tree.

25 Q. Okay. So she can't see you?

1 A. Yeah. No, ma'am. But she knows. I mean, I don't
2 hide it. She knows I'm drinking, but I just kind of do it
3 where she can't directly see it.

4 Q. Okay. You went -- after you got back from your
5 parole officer meeting, is that when you drank the majority
6 of the five beers left?

7 A. Yes, ma'am.

8 Q. Okay. And then what did y'all do after that?

9 A. We went to Terrell, got more alcohol, went out to
10 eat.

11 Q. Okay. That's when you went to Chacho's; is that
12 right?

13 A. Yes, ma'am.

14 Q. Okay. When was it that he showed you the credit
15 cards?

16 A. In my front yard. Before we left, I seen them.

17 Q. And you said something interesting that you could --
18 when you read that it was Bertie?

19 A. Uh-huh.

20 Q. You thought that was an old lady's name, didn't you?

21 A. Uh-huh.

22 Q. Did you ever call him on it?

23 A. No, ma'am.

24 Q. Okay. You thought it was weird, but -- but it
25 didn't matter?

1 A. Yeah, it didn't matter. It was Jim, you know.

2 Q. Okay.

3 A. I've been knowing him forever. I had no reason to
4 disbelieve him.

5 Q. Okay. And he was going to buy you some alcohol; is
6 that right?

7 A. Yes, ma'am.

8 Q. Okay. With those credit cards?

9 A. With those credit cards.

10 Q. And y'all went over to Chacho's; is that right?

11 A. Yes, ma'am.

12 Q. Let me ask you about what happened at Chacho's.
13 Now, Jim went in; is that right?

14 A. Yes, ma'am.

15 Q. And then at one point didn't the owner's wife,
16 Mrs. -- is it Aridi?

17 A. Something like that.

18 Q. Okay. She came out and you shouted to her; isn't
19 that right?

20 A. Yes, ma'am.

21 Q. And what did you tell her to get?

22 A. Told her to tell Jim to get some orange juice.

23 Q. Did he already know that you wanted the Hennessy?

24 A. Yes, ma'am.

25 Q. Okay. But he came out without it the first time?

1 A. I don't remember exactly how it happened. I think
2 he was in the store and she may have ran over to the liquor
3 side, I think, and got the Hennessy and was walking back and
4 he was still in the store when she stuck her head in, yelled
5 or told her husband to get the orange juice. I don't know,
6 he came out with orange juice.

7 Q. And did you actually go in and take the bag of --
8 that had the Hennessy in it?

9 A. I don't know if she handed it to me or -- I stepped
10 out of the car. She may have handed it to me, but I don't
11 think I ever went in the store.

12 Q. Okay. So -- so if on the videotape of the store
13 they show you taking the bag out, then you don't remember
14 that?

15 A. If they -- I don't think I went into the store. I
16 could have got it from her, because the -- I don't know,
17 liquor is not supposed to be on the beer side, but I don't
18 think I'd be on tape, period.

19 Q. Okay. And then -- when y'all left your house that
20 day, you said on your direct examination that y'all were
21 going out to eat and to do a little drinking?

22 A. Yes, ma'am.

23 Q. Okay. And y'all went to Cole Mountain to eat?

24 A. Yes, ma'am.

25 Q. And y'all both ordered up a big order?

1 A. Yes, ma'am.

2 Q. And Jim didn't eat his, did he?

3 A. No, he didn't.

4 Q. Okay.

5 A. He didn't eat, just kind of picked at it.

6 Q. Did he eat any of those -- those cheese sticks that
7 you said that y'all ordered, or do you remember?

8 A. Yeah, I think he did eat some of my cheese sticks
9 while we were waiting on it.

10 Q. Okay. But he didn't finish his meal?

11 A. No, he didn't.

12 Q. And that's what y'all boxed up to take to your
13 granny?

14 A. Yes, ma'am.

15 Q. Okay. That was a little different for Jim, didn't
16 you think?

17 A. What's that?

18 Q. That he didn't eat his food?

19 A. It kind of -- I just wondered why he didn't eat, you
20 know. He spent that much money, and he didn't eat.

21 Q. Okay. Was he still drinking at this time?

22 A. I think we both ordered a beer, but he wasn't
23 drinking like he normally would be drinking.

24 Q. Okay.

25 A. If we was out, you know, kicking it, he would be --

1 (Makes noise.)

2 Q. (By Ms. Balido) Okay.

3 A. He was kind of laid back.

4 Q. All right. Had he had any more -- any more of those
5 beers that you originally saw in his car?

6 A. No, ma'am, he never did drink no more of them. I
7 drank all the rest of the 18-pack.

8 Q. What about the two 18-packs y'all got at Chacho's,
9 did y'all open up a couple of those and kick those back
10 before you ate at Cole Mountain?

11 A. I did. I don't know if he -- if he drank any out of
12 them two 18-packs, it probably wasn't no more than three or
13 four beers out of the two 18-packs that we purchased.

14 Q. Okay. Ever hit on that bottle of Hennessy?

15 A. I think he did when we was up -- because we went to
16 some friends' apartments, you know. There was a whole bunch
17 going on. We were drinking. I poured up the glasses for
18 everybody. And a couple of guys, they were just sitting
19 there drinking them straight. He was sitting on the couch to
20 my right, just sitting there, kind of just peeping out
21 everything that was going on. We was drinking and I don't --
22 if he did, he drank out of my glass, but I don't think he
23 actually had --

24 Q. Okay.

25 A. -- a glass.

1 Q. But do you think he had any of that before y'all
2 went to Cole Mountain?

3 A. What? Any liquor?

4 Q. Any Hennessy?

5 A. Huh-uh.

6 Q. Okay. That just happened all at the apartment?

7 A. Yes, ma'am. The bottle wasn't even opened until we
8 made it back to Edgewood.

9 Q. Okay. And were there times when he was at Cole
10 Mountain that he just kind of sat there and was being quiet
11 and kind of just stared at his food or kinda didn't talk
12 much?

13 A. He seemed like he was a little preoccupied at times,
14 but --

15 Q. Still a little starry-eyed?

16 A. I don't know. It was like he wasn't in it, you
17 know. He was just going through the motions.

18 Q. Okay. And after y'all got finished at Cole
19 Mountain, y'all stopped at a gas station again?

20 A. Yes, ma'am.

21 Q. And that was to buy him some Roloids; is that right?

22 A. Roloids, gas.

23 Q. Because his stomach was kind of bothering him?

24 A. Yes, ma'am.

25 Q. Did y'all buy any more beer there?

1 A. No, ma'am.

2 Q. Y'all didn't buy any more Hennessy there?

3 A. No, ma'am.

4 Q. Okay. When was it that you went over to this
5 apartment?

6 A. As soon as we rolled back into Edgewood, we was
7 headed back to Granny's and we seen a few of the people that
8 lived in the apartments out on the sidewalk. We were driving
9 by. We seen two girls. We stopped. Like, hey, what are
10 y'all doing. They were like nothing. We were talking to
11 Ryan and Carmela, "We going to do something tonight?" And I
12 was like "Y'all want to drink some?" And I pulled out the
13 bottle of Hennessy and they didn't really say they wanted to
14 drink. They was like that's a lot of alcohol,
15 blah-blah-blah. And that's when we said we'd be back. We
16 went to Granny's for a minute I think and came back up to the
17 apartment and that's when we sat and drank.

18 Q. Whose apartment is that?

19 A. Ryan and Carmela's.

20 Q. Okay. And was that when -- was Christy Baugh and
21 Paul Privet there? Is Paul who you call PA?

22 A. Yes, ma'am.

23 Q. So it was Kristi and PA, were they also there?

24 A. Yes, ma'am.

25 Q. Okay. And was anybody smoking dope at the

1 apartment?

2 A. Yes, ma'am.

3 Q. And were you smoking dope?

4 A. Yes, ma'am.

5 Q. And was the defendant smoking dope, Jim?

6 A. I don't -- I don't remember him hitting it, but --

7 Q. But you don't know if he did or not?

8 A. Why don't you ask him?

9 Q. Okay. A lot of -- a lot of pot, a little bit of
10 pot, how many joints do you think y'all had?

11 A. One fat one.

12 Q. Okay. When was it that -- that somebody decided to
13 go buy some more pot; is that right?

14 A. No, ma'am.

15 Q. Y'all never went to a different place?

16 A. No, ma'am. We had -- we got it and then came
17 there. We already had it, you know. He stayed at my
18 grandma's --

19 THE COURT: Excuse me.

20 Sheriff, would you retire the jury for a moment?

21 This will be a very, very short recess.

22 (Jury excused from courtroom.)

23 THE COURT: Jury has been excused from the
24 courtroom on the Court's own motion at this time.

25 Mr. Murphy, counsel, visitors in the gallery, you

1 may be seated.

2 Mr. Tarrant, are you presently on parole still?

3 THE WITNESS: Yes, sir.

4 THE COURT: Questions have been posed to you
5 with regard to conduct which arguably could be considered
6 criminal.

7 THE WITNESS: Yes, sir.

8 THE COURT: That could result in your parole
9 being revoked and your being returned to the penitentiary.
10 The Court at this time, unless you instruct me not to, I'm
11 inclined to appoint you an attorney to represent you with
12 regard to your testimony. This will be at no cost to you.

13 THE WITNESS: Yes, sir.

14 THE COURT: Because matters dealing with the
15 smoking of marijuana, and is it not also my understanding
16 that a condition of parole you are not supposed to drink
17 alcoholic beverages?

18 THE WITNESS: Yes. I don't have a stipulation
19 in my parole about alcohol, because I don't have a drug
20 related case or anything. But I'm not supposed to smoke
21 marijuana, but I'm just trying to be truthful.

22 THE COURT: I understand -- you're being
23 truthful. And I commend you for your candor and honesty.
24 However sometimes one's candor and honesty may be such that
25 it results in a criminal case being filed against them.

1 THE WITNESS: Yes, sir. But I mean if I
2 was -- I wouldn't test positive for marijuana because I don't
3 use it everyday. It was just the time and the --

4 THE COURT: Counsel for both sides going to
5 further explore the marijuana ingestion by this witness?

6 Ms. Balido, are you further going to --

7 MS. BALIDO: Well, first, Judge, he testified
8 about going and buying some weed yesterday in his testimony.

9 THE COURT: Well, I understand that. And I --

10 THE WITNESS: That's the same -- that's the
11 same marijuana that we -- I didn't actually purchase it.
12 Christy purchased it. I just took her to where it would be
13 made available for her.

14 THE COURT: No, no, don't talk.

15 THE WITNESS: Yes, sir.

16 THE COURT: Don't talk about it.

17 THE WITNESS: Yes, sir. I understand.

18 MS. BALIDO: Judge, it's our contention that
19 he doesn't have anything to worry about on parole, based on
20 his testimony down here in this case. And we've asked for
21 any kind of agreements to that, and if that's what the
22 situation is with the State, we'd like to know it.

23 MR. DAVIS: Well, the State has no agreements
24 whatsoever with Mr. Tarrant. So that's the state of affairs
25 right now. I have not spoken with his parole officer, don't

1 intend to speak with his parole officer, make no bargains or
2 deals with him for his testimony.

3 THE COURT: Sheriff, would you see if either
4 April Smith or Adam Seidel, both of whom have been here --

5 THE BAILIFF: Yes, sir.

6 THE COURT: -- this morning are available?

7 (Brief pause.)

8 THE COURT: Let the record reflect the
9 Honorable Hugh Lucas has been commandeered by a Bailiff
10 assigned to the 194th District Court.

11 Mr. Lucas, the gentleman on the witness stand,
12 Treshod Tarrant, he is originally a witness for the State in
13 this, a capital murder case. He has presented testimony to
14 the impaneled jury and one alternate about certain activities
15 that were conducted by him and the defendant, Mr. Jedidiah
16 Isaac Murphy, shortly before Mr. Murphy was arrested,
17 subsequently indicted, charged with capital murder.

18 Mr. Tarrant, I'm going to invite you at no cost to
19 you to speak with this gentleman with regard to your
20 testimony.

21 Mr. Lucas, let me explain to you that he is on
22 parole. He has testified about certain matters dealing with
23 smoking of marijuana which arguably could be a reason to
24 revoke his parole. Before we further explore that, I would
25 like for him to have the benefit of counsel with regard to

1 his 5th Amendment rights.

2 Do you have any -- I may invite you off the record
3 to confer with the attorneys on both sides.

4 MS. MILLER: I was just going to tell him,
5 Judge, that Mr. Tarrant had already testified yesterday to
6 the use.

7 THE COURT: All right.

8 MS. LITTLE: From the State.

9 MS. MILLER: And has testified again already,
10 so it is on the record at least twice already.

11 THE COURT: And I should have, but I was not
12 anticipating -- it came up just like that before I could --

13 Mr. Tarrant, let me ask that you step down and
14 confer with this attorney in private.

15 THE WITNESS: Yes, sir.

16 THE COURT: Mr. Lucas, if you and Mr. Tarrant
17 want to go back and use my office.

18 (Recess of proceedings.)

19 THE COURT: Let the record reflect the Court
20 on its own motion has occasioned a recess in the trial.
21 During the recess the Court takes note that the Honorable
22 Hugh Lucas has had an occasion to counsel with the witness,
23 Treshod Tarrant.

24 Mr. Tarrant, do you acknowledge that you've had an
25 opportunity to confer with your attorney, Mr. Lucas?

1 THE WITNESS: Yes, sir.

2 THE COURT: Mr. Lucas, do you feel you've had
3 an adequate opportunity to familiarize yourself with the
4 circumstances from a legal nature confronting Mr. Tarrant as
5 it relates to his testimony in this trial?

6 MR. LUCAS: Yes, Your Honor.

7 THE COURT: Are you available to remain in
8 Court with him while he continues his testimony before the
9 jury?

10 MR. LUCAS: Yes, Your Honor. I'm ready to put
11 some things in the record when the Court's ready.

12 THE COURT: You may.

13 MR. LUCAS: Your Honor, I was appointed to
14 represent this individual as a witness. And I've advised Mr.
15 Tarrant of my appointment. It's my understanding that he's
16 already testified earlier during this court proceeding that
17 he did in fact use marijuana in Van Zandt County I think
18 within the last six months or within the last year. There
19 has been no case filed in Van Zandt County. I've talked to
20 the Assistant District Attorney Mr. Davis, who advised me
21 that the State of Texas and Dallas County does not intend to
22 prosecute him and if, in fact, any cases arise in or any
23 investigation arises regarding the filing of charges, the
24 District Attorneys Office of Dallas County will recommend the
25 are charges not be filed. If, in fact, the parole

1 authorities attempt to revoke Mr. Tarrant, Dallas County
2 District Attorney's Office advised me that they will -- they
3 will inform the parole authorities that witness was a
4 material witness in a capital murder and will urge the State
5 not to seek revocation.

6 I've also told the witness, Mr. Tarrant, that while
7 in the District Attorney office I handled parole matters for
8 a number of years and it's my opinion that the parole
9 authorities will not seek to revoke this witness as he is a
10 material witness in a capital murder. And there is no case
11 filed at this time. I've advised the defendant that anything
12 is possible, that he can be hit by an automobile on his way
13 home, that the State could seek to revoke his parole, but in
14 my opinion that will not happen. And I told him that if
15 there is any type of parole hearing, I will without fee,
16 without charge represent him. So after all of these
17 warnings, Your Honor, Mr. Tarrant has advised me that he's
18 told the truth throughout this proceeding and he wants to go
19 ahead and testify knowing the possible dangers involved. He
20 wants to go ahead and testify truthfully before the jury as
21 he has throughout the trial.

22 Mr. Tarrant, is everything I've said to the Judge
23 true and correct?

24 THE WITNESS: True and correct.

25 THE COURT: Mr. Lucas, may I ask that you

1 remain available in the courtroom while he testifies? Does
2 your schedule --

3 THE WITNESS: Fine, Judge.

4 THE COURT: -- professional and personal such
5 that you can avail yourself?

6 THE WITNESS: Available, Your Honor.

7 THE COURT: Thank you.

8 Sheriff, may I ask that you bring in the jury.

9 THE BAILIFF: Yes, sir.

10 THE COURT: Mr. Tarrant, at any time during
11 your examination by attorneys for either side you wish to
12 stop the proceedings and confer with your attorney, Mr.
13 Lucas, if you'd please let me know, and I will be more than
14 happy to make time available for you to confer with your
15 attorney?

16 THE WITNESS: Yes, sir.

17 THE COURT: Do you understand that?

18 THE WITNESS: Yes, sir.

19 THE BAILIFF: All rise.

20 THE COURT: Let the record reflect the jury is
21 returning to the courtroom at this time.

22 (Jury returned to courtroom.)

23 THE COURT: Jurors may be seated.

24 Mr. Murphy, counsel, Mr. Tarrant, visitors in the
25 gallery, you may be seated.

1 Ladies and gentlemen of the jury, in your absence
2 the Court in light of testimony presented by this witness,
3 felt compelled to appoint counsel to represent Mr. Tarrant.
4 I have done so in the person of the Honorable Hugh Lucas, the
5 gentleman whom you see seated in the front row who has just
6 risen. Mr. Lucas is now an attorney in private practice. He
7 was for many, many years a Assistant District Attorney.
8 Though he has far more hair than I, he and I were both law
9 school classmates.

10 He has agreed to the appointment that I have
11 assigned him to represent Mr. Tarrant. Mr. Tarrant, Mr.
12 Lucas have had an opportunity during their recess to confer
13 with one another. Mr. Lucas will be present in court at all
14 times during Mr. Tarrant's continued testimony. I apprised
15 Mr. Tarrant that if at any time an attorney for either the
16 State or the defense asks a question about which he has a
17 question as to his legal rights as it relates to his parole
18 status or otherwise, be giving him an opportunity to confer
19 with Mr. Lucas.

20 With that understanding --

21 Is that your understanding as well, Mr. Tarrant?

22 THE WITNESS: Yes, sir, it is.

23 THE COURT: Ms. Balido, you may proceed.

24 And, ladies and gentlemen of the jury, I apologize
25 for the delay.

1 MS. BALIDO: Thank you, Judge.

2 Q. (By Ms. Balido) Now, Mr. Tarrant, what we were
3 talking about is when y'all drove out to go buy some
4 marijuana; is that correct?

5 A. Yes, ma'am.

6 Q. Okay. And when did that occur?

7 A. That occurred after we returned from, you know,
8 going out and eating and buying the beer, we sit around, and
9 was talking and the girls wanted some marijuana. We was
10 already back into Edgewood.

11 Q. Okay. So --

12 A. After the evening was over, our little dinner and
13 the beer buying.

14 Q. Okay. Let me ask you specifically where you were.
15 Y'all had already eaten dinner and gone and bought Roloids
16 after dinner; is that correct?

17 A. After we got back to Edgewood, we met the girls. We
18 talked to the girls. She wanted to go get some weed. I
19 left. Jim stayed at -- in Edgewood. Me and her and PA left,
20 went to Wills Point, called a guy up to the car, and her and
21 him talked. She gave him the money, got the marijuana. Came
22 back to Edgewood.

23 Q. Okay. And so where in Edgewood was Jim at that
24 time?

25 A. At my granny's house.

1 Q. Okay. And was your granny there?

2 A. Yes, ma'am.

3 Q. All right. And which car did you drive to go buy
4 this marijuana, your car?

5 A. Ms. Cunningham's car.

6 Q. Okay. And that's the Honda that we've been talking
7 about?

8 A. Yes, ma'am.

9 Q. So far you've eaten dinner off of Ms. Cunningham's
10 cards, credit cards?

11 A. Yes, ma'am.

12 Q. You've bought some alcohol with Ms. Cunningham's
13 credit cards?

14 A. Yes, ma'am.

15 Q. And now you're driving Ms. Cunningham's car to go
16 buy some weed in Wills Point?

17 A. Yes, ma'am. But I thought it was Mr. Murphy's car.

18 Q. Okay. But it's still a car that you've never seen
19 him in before?

20 A. Yes, ma'am.

21 Q. And let me ask you a little bit about this car. You
22 said that he said that he shot a deer. You need to say yes
23 or no.

24 A. Yes, ma'am.

25 Q. Did you ever ask to see that deer?

1 A. No, ma'am, I didn't.

2 Q. Did you ever open up the back of the trunk to see if
3 it actually was a deer?

4 A. No, ma'am. I didn't think the deer was in the car.
5 I thought maybe the blood that was left in the car was --
6 that's what I saw on the bumper.

7 Q. Okay.

8 A. From him killing the deer.

9 Q. Okay. So you -- you didn't think the deer was in
10 the car?

11 A. No, ma'am.

12 Q. Okay.

13 A. That's why I didn't ask to see it. I wasn't going
14 to be riding around with a deer in a trunk.

15 Q. Okay. Did you ever open the trunk?

16 A. No, ma'am.

17 Q. So you didn't think it was odd that he shows up in a
18 car that you've never seen before with blood on it, with
19 credit cards with an old lady's name on it, buying you
20 stuff -- did he usually buy you stuff?

21 A. Yes, ma'am, we treat each other --

22 Q. All the times?

23 A. -- on the town before, yes, ma'am.

24 Q. Okay. So you didn't think it was weird when all
25 these things happened?

1 A. No, ma'am.

2 Q. And in fact you were talking about having a buying
3 spree the next day; is that correct?

4 A. Yes, ma'am.

5 Q. Okay. So after you went out in Ms. Cunningham's car
6 and went to Wills Point and bought the marijuana, about how
7 much did you buy?

8 A. I don't know. She bought it. She --

9 Q. You didn't see the bag?

10 A. No, they went -- he went around the side of the
11 car. Her and him conversed. And she gave him the money.
12 They -- and we left, took off.

13 Q. Okay. So you never saw the bag of marijuana ever?

14 A. I know it was a sack of marijuana and she rolled up
15 a joint and I was drinking and I took a few puffs off of it
16 sitting up at the apartment with Ryan and Carmela. And that
17 was it.

18 Q. How many --

19 A. And several other people, you know, were passing it
20 around.

21 Q. Okay. About how many joints did y'all roll up and
22 pass around?

23 A. I think one or two. I think she rolled another one
24 after the first one, but I know it wasn't more than two.

25 Q. Okay. So after y'all went and bought the marijuana,

1 did you go back to your granny's house?

2 A. Yes, ma'am.

3 Q. And go pick up Jim?

4 A. No, Jim was with me while we were sitting up at the
5 apartment. After we got back from buying marijuana, we went
6 to Granny's, got Jim, and then we returned back up to the
7 apartment and that's when we were sitting around drinking,
8 talking, smoking. And me and Jim went back to Granny's after
9 we finished.

10 Q. Okay. About how long do you think that you drank
11 and smoked -- smoked that night?

12 A. An hour and a half, maybe, hour.

13 Q. Okay.

14 A. It wasn't that long because we were in bed by 11
15 o'clock.

16 Q. Okay. Did you feel like you were intoxicated that
17 night?

18 A. Oh, yeah.

19 Q. Oh, yeah?

20 A. Yes, ma'am.

21 Q. Okay. Did the effect -- were you intoxicated both
22 on alcohol and marijuana?

23 A. I was sleepy. I think the marijuana made me
24 sleepy. That's why we ended up going to bed, you know, at 11
25 o'clock because I'm sleepy.

1 Q. Okay.

2 A. That's something I don't usually do. So therefore
3 it made me all tired and -- well, I went to bed.

4 Q. Okay. And you went to bed at about 11 o'clock, and
5 what time were you pulled out of bed by the police?

6 A. Around 3:00, 3:30 that morning.

7 Q. How did you feel when they pulled you out of bed?

8 A. I was wondering what was going on. I was like,
9 police come in the house. I hadn't done nothing, and I'm
10 sitting there, just what is going on, what is going on. They
11 are "put your hands up where we can see them." I put my
12 hands up where they can see them. I was like I hadn't done
13 nothing. I hadn't done nothing. They were like "we ain't
14 here for you.

15 Q. Okay". That's when you said you saw this laser tag
16 kind of flashlights going on?

17 A. Yes, ma'am. I was waking up. And then when I woke
18 up, the laser tag was going on and I realized, hey, there's
19 police in the house.

20 Q. Okay. When the police came into your house, were
21 you still feeling the effects of the alcohol?

22 A. Not really.

23 Q. Okay. You usually sleep that off pretty good?

24 A. Yes, ma'am.

25 Q. What about the marijuana?

1 A. Huh-uh.

2 Q. Were you groggy from being asleep?

3 A. No, ma'am, not after they came in. I was wide
4 awake, wondering what was going on.

5 Q. Okay. Tell me where exactly you got taken. Or did
6 you stay in the room for a little while?

7 A. I was laying in the bed for a minute. They got Jim
8 into custody. Then they told me, you know, come on, let's
9 get up. And I had my boxers and they kind of let me pull
10 them up. They took me into the living room and -- where I
11 was sitting on the couch. Granny was in the kitchen. And
12 they were back there dealing with Jim.

13 Q. Okay. Let me ask you a little bit about what you
14 saw when they put him into custody. What did you actually
15 see them do, Treshod?

16 A. What did I see them do?

17 Q. What did you see the police do to Jim to -- you say
18 they put him in custody?

19 A. They grabbed his ankles, pulled his ankles up toward
20 his butt and grabbed his arms, pulled his butt back, you
21 know, his arms towards his -- you know, like they was going
22 to hog tie him.

23 Q. Okay.

24 A. And --

25 Q. Did they say you're under arrest?

1 A. No, ma'am.

2 Q. Okay. Did you hear them ever give him his
3 warnings? You know what Miranda warnings are, don't you?

4 A. Yes, ma'am.

5 Q. Did you ever hear them ever do that?

6 A. No, ma'am. I was in the living room by that time.

7 Q. Okay. But when they were -- did you actually see
8 them -- see the police put him up and sit him down on the
9 bed?

10 A. No, ma'am.

11 Q. Okay. Now, who was -- who were the guys that
12 questioned you?

13 A. The Garland police, Officer Mendoza, and
14 Detective -- Lieutenant somebody, his Lieutenant, Mendoza's
15 Lieutenant.

16 Q. Okay. And that's with the Garland Police
17 Department?

18 A. Yes, ma'am.

19 Q. Were you ever questioned by -- I think you said
20 yesterday that Gary Rose and Jason Bonham took you to the
21 police station?

22 A. No, ma'am.

23 Q. Did you say that yesterday?

24 A. No, ma'am. I never did go into the police station.

25 Q. Okay.

1 A. I was just questioned thoroughly over and over and
2 over and over again to make sure that what I was saying was
3 true. And after they -- I told them over and over again,
4 they believed me, because I didn't have nothing to hide and
5 just left it at that.

6 Q. Okay. So when you told them something over and over
7 again, they believed you, right?

8 A. Yes, ma'am.

9 Q. Okay.

10 A. I mean, they couldn't -- I'm sure they looked for
11 holes in my story, but I mean they couldn't find it because
12 it was the truth.

13 Q. But your story was pretty consistent so they
14 believed you, as far as you know?

15 A. As far as I know.

16 Q. And who did all this questioning over and over and
17 over again? Was that Gary Rose?

18 A. Mendoza, his Lieutenant.

19 Q. Was that Lieutenant Thompson? Does that sound
20 familiar?

21 A. I'm not for sure.

22 Q. But he was a lieutenant?

23 A. Yes, ma'am.

24 Q. But they never took you to the police station?

25 A. No, ma'am.

1 Q. Did you help Jim put Ms. Cunningham in the creek?

2 A. No, ma'am, I didn't.

3 Q. Did you ever tell any of the officers that you did
4 not put her in the creek?

5 A. Yes, sir (sic). One of the officers tried to say
6 that -- well, how did his little hundred and something pounds
7 self do this by himself and I told them the same way that he
8 killed her is the same way that he did whatever with her.

9 Q. So you knew at that point that he had killed her?

10 A. No, I knew at the point that he had killed her after
11 they drug him out of the room and they come out and left and
12 came back. And I asked my granny what was going on. And she
13 said can I tell him.

14 Q. You were -- you were pretty quick with that
15 knowledge, weren't you, that the same way that he killed
16 her. You didn't know about that beforehand?

17 A. No. When the police asked me, did I help him take
18 the body out of the trunk and throw her into the creek, I
19 said no, the same way, you know, he had the strength to kill
20 the lady is the same way I guess he threw her in the creek.

21 Q. Okay. And that's one of the things that you said
22 over and over?

23 A. No. What I told them over and over was about the
24 night, the beginning from 4 o'clock that evening to the time
25 that they came.

1 Q. Okay. And you told them about -- about buying
2 marijuana; is that correct?

3 A. Yeah, I told them. I ain't got nothing to hide.

4 Q. And you told them about using marijuana; is that
5 correct?

6 A. Yes, ma'am.

7 Q. And you're on parole, aren't you?

8 A. Yes, ma'am.

9 Q. And part of your parole is --

10 A. Do not use drugs.

11 Q. Okay. And do you have a -- what they call a blue
12 warrant, a warrant out for your arrest because you violated
13 your parole?

14 A. No, ma'am.

15 Q. Do you have any violations pending at this point?

16 A. No, ma'am.

17 Q. When you met up with your parole officer that day,
18 did you tell her you were going to go out and buy marijuana
19 that night?

20 A. No, I didn't know that I was going to buy -- I
21 didn't buy marijuana. Christy bought marijuana.

22 Q. Did you help facilitate somebody buy marijuana that
23 night?

24 A. Yes, ma'am.

25 Q. Did you tell your parole officer when you made that

1 appointment that day that you were going to go out and do
2 that that night?

3 A. No, ma'am. This was after I had made my appointment
4 with my parole officer.

5 Q. Okay. Now, you understand that the District
6 Attorneys Office has said that if anything that you testify
7 to in this court, a case in Van Zandt County arises from what
8 you've testified to, that they'll recommend that a case not
9 be filed on you?

10 MR. DAVIS: I'm sorry. That's a
11 misrepresentation of what the Court has previously been told,
12 and I would object to that. The Court is well aware that all
13 that I have said is that right now I have no plea bargains
14 with this individual, that if his parole officer calls me,
15 that I will advise them that he has been a material witness
16 in this case and that I would recommend that his parole not
17 be revoked as a result of his testimony. And the Court is
18 well aware that that is the only agreement that has been
19 stated to this Court, and there is nothing said about what
20 may or may not occur in Van Zandt County, Texas. And I
21 object to that --

22 MS. BALIDO: Judge --

23 MR. DAVIS: -- as being a misrepresentation.

24 MS. BALIDO: Judge, I'm just going with what
25 Mr. Lucas proffered to the Court before the jury was brought

1 back in.

2 THE COURT: Let's move on.

3 Q. (By Ms. Balido) You're not too worried about your
4 parole, are you?

5 A. No, because I don't do it. It was just like a
6 special occasion. I did it that one night. And if he asks
7 me, I'll tell him, yes, sir, that I did use. But if, you
8 know, he give me a UA, I'm going to be clean. So I have
9 nothing really to worry about.

10 Q. And your UA's going to be clean because you know
11 that if you use marijuana after a certain time, it's going to
12 come back -- if you use marijuana and you don't get tested
13 until a couple of weeks afterwards, you know it's not going
14 to show up on the test? You know that, don't you?

15 A. Whatever.

16 Q. Okay.

17 MS. BALIDO: I don't have any further
18 questions.

19 Cross-Examination

20 By Mr. Davis:

21 Q. Mr. Tarrant let me -- let me talk to you a little
22 bit about kicking it with the defendant. I mean, you've been
23 out with him before, haven't you?

24 A. Yes, sir.

25 Q. Y'all have been out drinking before, I imagine?

1 A. Yes, sir.

2 Q. I mean, he likes to drink, doesn't he?

3 A. Yes, sir.

4 Q. He likes to drink a lot as a matter of fact, doesn't
5 he?

6 A. Yes, sir.

7 Q. Would you say that he's got a pretty good tolerance
8 for alcohol? In other words, does it take him a lot before
9 he gets a buzz on?

10 A. Yeah, he could drink probably as much as me and
11 still be functionable.

12 Q. That evening who was doing the driving while you
13 were with him?

14 A. He was.

15 Q. Did he have any trouble driving to Terrell?

16 A. No, sir.

17 Q. After y'all had dinner there at Cole Mountain, did
18 he have any trouble getting y'all back to Edgewood?

19 A. No, sir.

20 Q. Now, Ms. Balido asked you about him not eating. Did
21 you know that he had an upset stomach that night?

22 A. Yes, sir, he told me, because I asked him why didn't
23 he eat. He said his stomach was kind of upset. I'm like
24 okay. It's probably because he's been drinking two days.

25 Q. Do you know whether or not he's got an ulcer?

1 A. I think he does. I think he does.

2 Q. Now, did he ever tell you before the police came
3 there that he had actually shot this woman?

4 A. No, sir.

5 Q. Didn't share that with you?

6 A. No, sir. The only thing he told me was he's going
7 to Florida after we, you know -- he departed from me, he was
8 headed to Florida.

9 Q. When he got there to Chacho's that night to buy the
10 beer and the Hennessy, how was he acting then?

11 A. Normal.

12 Q. Have you had a chance to look at how he was acting
13 inside that Chacho's in Terrell?

14 A. No, sir.

15 MR. DAVIS: That's all. I pass the witness,
16 Your Honor.

17 Redirect Examination

18 By Ms. Balido:

19 Q. Let me ask you a question, Mr. Tarrant, about the
20 car, a couple more questions about the car. You said that
21 you saw blood on it?

22 A. Uh-huh.

23 Q. You need to say yes or no.

24 A. Yes, I saw blood.

25 Q. And you saw -- and you asked -- you asked Mr. Murphy

1 about it, and he said that he had shot a deer; is that
2 correct?

3 A. Yes, ma'am.

4 Q. And when you drove that car to go buy some
5 marijuana, did it smell?

6 A. Yes, ma'am. It smelled like a bunch of dried up
7 blood or something. It had a stench to it.

8 Q. Okay. And you never -- that didn't seem odd to you?

9 A. Yeah, it seemed odd. I asked him about that when I
10 first entered the car. That's when he told me, you know, he
11 shot the deer. He couldn't get the blood out of the back,
12 cracked the window. Once we get going, you won't be able to
13 smell it.

14 Q. Okay. And so you never ventured any -- any further?

15 A. Huh-uh. No, ma'am.

16 Q. And it didn't seem -- it didn't seem odd to you?

17 A. No, ma'am, because he had been deer hunting before.
18 I mean, the first gun I seen was one of his. It was a 30-30
19 on the top and a 12 gauge on the bottom, an over and under.

20 Q. Okay. But what my question is, is he shows up with
21 this car with blood on it, correct?

22 A. Uh-huh.

23 Q. Yes or no.

24 A. Yes.

25 Q. He -- it smells like blood?

1 A. Yes, ma'am.

2 Q. He's got credit cards?

3 A. Yes, ma'am.

4 Q. With what you term an old lady's name on it; is that
5 correct?

6 A. Yes, ma'am.

7 Q. And none of that seemed to ring any bells to you?

8 A. No, because it's Jim. I mean, I've known Jim
9 forever. Nothing striked (sic) odd until the police came
10 into the house that night.

11 Q. Okay. But it didn't keep you from -- it wasn't odd
12 enough to keep you from benefitting from all the purchases?

13 A. Benefitting --

14 MS. BALIDO: Pass the witness because I don't
15 have any further questions, Judge.

16 MR. DAVIS: No further questions, Judge.

17 THE COURT: You may step down, sir. Return to
18 the waiting room.

19 Defense may continue.

20 Mr. Lucas, you may be excused as well.

21 (Witness brought forward.)

22 MS. BALIDO: The defense calls Jason Bonham.

23 Judge, I believe this witness has been previously
24 sworn but not sworn in front of the jury.

25 (Witness sworn.)

1 THE COURT: Thank you, Ms. Balido.

2 JASON BONHAM

3 was called as a witness by the Defendant and, after having
4 been first duly sworn, testified as follows:

5 Direct Examination

6 By Ms. Balido:

7 Q. Can you please state your name?

8 A. Jason Bonham.

9 Q. And what do you do for a living, Jason?

10 A. Run my own lawn care service, and I'm a police
11 officer.

12 Q. Okay. Are you a reserve police officer?

13 A. Yes, ma'am.

14 Q. Okay. Back in October of the year 2000, were you a
15 full-time police officer?

16 A. Yes, ma'am.

17 Q. And for which agency?

18 A. The Wills Point Police Department.

19 Q. Now, you know the person sitting to my left,
20 Jedidiah Isaac Murphy; is that correct?

21 A. Yes, ma'am.

22 Q. And you know him as Jim Murphy?

23 A. Yes, ma'am.

24 Q. And how do you know him?

25 A. We were classmates.

1 Q. Okay. Back in October, I guess the late night hours
2 of October the 5th and early morning hours of October 6th,
3 were you driving back in to Edgewood -- well, number one,
4 were you on duty that night?

5 A. No, ma'am.

6 Q. What were you doing that night?

7 A. I was working an off-duty security job.

8 Q. Okay. And after you got finished working that
9 off-duty security job, did you drive in to Edgewood?

10 A. Yes, ma'am.

11 Q. Okay. And did you notice as you drove in a bunch of
12 police cars at the Dairy Queen?

13 A. Yes, ma'am.

14 Q. Okay. And what did you do when you saw that?

15 A. I recognized the officers in the cars, and I stopped
16 in to say hello. They were friends. See what was going on.

17 Q. And did you find out what was going on?

18 A. Yes, ma'am.

19 Q. And what was going on?

20 A. Basically they told me that they were there -- they
21 had a bolo, ways of -- means of communication between
22 departments on a car that had been stolen, reported stolen,
23 and the possible occupant of the car and where they were at,
24 and asked me if I knew anything about either of the
25 occupants.

1 Q. Okay. And the occupant that they were asking you
2 about was Jedidiah Isaac Murphy?

3 A. Yes, ma'am.

4 Q. And initially what did you think about that? Did
5 you know that person?

6 A. Yes, ma'am.

7 Q. Okay. And so did you find out where they were --
8 where Mr. Murphy supposedly was?

9 A. Yes, ma'am.

10 Q. And where was he?

11 A. At Treshod Tarrant's house.

12 Q. Okay. Did you know Treshod Tarrant?

13 A. Yes, ma'am.

14 Q. How did you know Treshod?

15 A. I also went to school with him.

16 Q. Okay. And did you know where Treshod and Ora Mae
17 Milton lived?

18 A. Yes, ma'am.

19 Q. And that's not far from either your house or your
20 grandmother's house; is that right?

21 A. I grew up two blocks from there.

22 Q. Okay. Did you become, I guess, part of the arrest
23 team that went out to Ms. Milton's house?

24 A. I was present when they went -- when everybody went
25 to Ms. Milton's house. I wouldn't say I was part of the

1 arrest team. I didn't go -- I wasn't part of the entry team
2 or anything like that.

3 Q. Okay. But -- but you knew the house; is that
4 correct?

5 A. Yes, ma'am.

6 Q. And so you drew them a map?

7 A. Yes, ma'am.

8 Q. And who was in charge of -- I guess we'll call the
9 entry team?

10 A. Chief Deputy Gary Rose.

11 Q. Okay. And what did you do as part of -- to help
12 effect this arrest beside making the map?

13 A. Since I grew up in the area, they asked me if I was
14 familiar with the terrain outside the house. I was. And he
15 asked -- Gary Rose asked me if I would take a couple of
16 officers around the back so -- in a way that they wouldn't be
17 detected so they could watch the outer perimeter.

18 Q. Was there any kind of discussion ever that they were
19 supposed to wait until Garland actually got there, or were
20 they just supposed to move in, or do you know?

21 A. I don't recall any discussion like that.

22 Q. Were you -- well, let's see. So you were on the
23 outside of the house and -- towards the back of the house
24 when the entry team actually went in?

25 A. Yes, ma'am.

1 Q. And how long was the entry team in there?

2 A. Roughly 30, 45 minutes.

3 Q. Were they in there 30 or 45 minutes before you went
4 in?

5 A. From the time that we got to the -- to the back of
6 the house and one of the other officers that had a radio,
7 radioed to everybody else and told them that we were in
8 position, they came in. I don't know who it was, somebody
9 knocked on the door. I could hear the knock. Ms. Milton let
10 them in. They talked for however long, 30, 45 minutes, and
11 then that's when they started coming out.

12 Q. Okay. So were you outside the house and was Gary
13 Rose inside the house?

14 A. Yes, ma'am.

15 Q. Okay. And were you ever present when Gary Rose
16 read, or did you ever hear Gary Rose read Mr. Murphy his
17 rights?

18 A. No, ma'am.

19 Q. Could you hear anything that was going on inside the
20 bedroom from where you were standing?

21 A. No, ma'am.

22 Q. And when was the next time you saw Gary Rose?

23 A. When he came out of the house.

24 Q. Came all the way out of the house?

25 A. Yes, ma'am.

1 Q. And what did he do when he came all the way out of
2 the house?

3 A. He came out the front door. We were all standing in
4 the front. He spoke with one of the other deputies that were
5 there. I don't remember who. He spoke with them briefly.
6 And they pointed out some -- something that -- that he would
7 probably want to look at that was on the trunk of the car
8 that was parked in front of the house.

9 Q. Okay. That looked like blood?

10 A. Yes, ma'am.

11 Q. And then did detective -- I'm sorry, Deputy Rose
12 ever approach you, or did you ever approach him?

13 A. Well, we were -- we was both standing side by side.
14 It's a rather small little area there in the front yard. We
15 were both standing pretty close to each other.

16 Q. And what did Deputy Rose say to you about what had
17 happened inside?

18 A. He couldn't -- he couldn't get anything that he
19 really thought was relevant out of Jim.

20 Q. Did he ever say that Jim had told him that the --
21 that Ms. Cunningham was dead?

22 A. No, ma'am.

23 Q. Or that somebody had dumped his -- dumped Ms.
24 Cunningham's body somewhere in Dallas? Did Rose ever tell
25 you that?

1 A. Not that I recall.

2 Q. Okay. And then did you go in there to the house?

3 A. Yes, ma'am.

4 Q. And why did you go in there?

5 A. To speak with Jim.

6 Q. Did you go in there kind of as a police officer or
7 as a friend or a little bit of both trying to just find out
8 what happened?

9 A. More or less a little bit of both.

10 Q. Okay. And before you went in there, did you inquire
11 of Deputy Rose as whether or not he was Mirandized?

12 A. Yes, ma'am.

13 Q. Okay. And did Deputy Rose say he had read him his
14 rights?

15 A. Yes, ma'am.

16 Q. Did Deputy Rose ever tell you that Mr. Murphy had
17 said, yes, that he understood his rights and had waived his
18 rights?

19 A. I don't recall that.

20 Q. Okay. When you walked into the room, what did you
21 see -- into the bedroom I'm talking about?

22 A. We walked into the bedroom. There's two beds -- two
23 twin size beds in the bedroom. Jim was sitting on the one
24 farthest from the door.

25 Q. Okay. What was his demeanor?

1 A. He had his head down.

2 Q. Okay. Did he look up and greet you when you walked
3 in?

4 A. No, ma'am.

5 Q. Before -- well, did that surprise you that he didn't
6 look up and greet you when -- when you came in?

7 A. I don't know if surprise was the word. I don't know
8 that he knew it was me that walked in the door.

9 Q. When you walked in, did you go in and sit down with
10 him?

11 A. Yes, ma'am.

12 Q. Okay. When he saw it was you, did he greet you
13 then?

14 A. Yes, ma'am.

15 Q. And did you ask him about this offense? Or let me
16 just ask you, you know, what did you ask him? What did you
17 say when you sat down with him?

18 A. Just asked him how he was and what was going on,
19 what happened.

20 Q. And what was his response to that?

21 A. He would turn away. He wouldn't look -- he was --
22 he would in no way look me in the face, look in my direction,
23 he would always look to the side and give a little moan or a
24 gesture, you know, man, type of thing.

25 Q. Okay. And did you ask him again what --

1 A. Yes, ma'am.

2 Q. And how did you do that? I guess just explain to
3 the jury what you said next.

4 A. When I spoke with him and he was kind of brushing me
5 off nonchalant, just looking away and everything, I still
6 wasn't sure what all had actually happened, so I just kind of
7 put it to him in a way that he could -- I felt he could
8 relate to. A couple of years earlier we had lost a
9 classmate, and I was one of the officers that was a part in
10 finding that classmate.

11 Q. That was a classmate that had committed suicide?

12 A. Yes, ma'am.

13 Q. Out in the country?

14 A. Yes, ma'am.

15 Q. And so how did you put it to him in those sorts of
16 terms?

17 A. That if there really was -- I don't know what all
18 happened, and as his friend I really didn't want to know what
19 all happened, I just wasn't -- if it was my mother or if it
20 was his mother, I don't think anybody would want to find her
21 in a position or the way that I found my friend.

22 Q. Okay. And how was that position?

23 A. The animals had pretty much had their -- had their
24 way with him.

25 Q. Okay. And so you recalled that to him?

1 A. Yes, ma'am.

2 Q. And what did -- and what did he say then?

3 A. Nothing that I recall immediately. His eyes bald up
4 and real watery -- got watery-eyed, and then he told me that
5 she was here.

6 Q. Okay. And did you inquire further as to what here
7 meant?

8 A. Yes, ma'am.

9 Q. And what did he tell you?

10 A. He kept saying she's just -- she's here, you know,
11 that type of thing.

12 Q. Okay. Did he ever give you a precise location as to
13 where she was?

14 A. Yes, ma'am.

15 Q. And where was that?

16 A. Eventually told me that she was at Livingston Hill.

17 Q. Okay. Was that a place you were familiar with?

18 A. Yes, ma'am.

19 Q. Okay.

20 MS. BALIDO: May I approach the witness.

21 THE COURT: Pardon me?

22 MS. BALIDO: May I approach the witness.

23 THE COURT: You may.

24 Q. (By Ms. Balido) I'm showing you what has been
25 marked and entered into evidence as State's Exhibit Number

1 28, Number 29, and then 30 right here. And is that what
2 you -- can you tell me if you recognize these locations?

3 A. Yes, ma'am.

4 Q. You need to speak up for the court reporter.

5 A. Yes, ma'am. Yes, ma'am.

6 Q. And is that the area outside of Edgewood that you
7 called Livingston Hill, or is that near the area?

8 A. Yes, ma'am.

9 Q. Okay. Can you tell me a little bit about -- about
10 basically the creek that's depicted in one of those
11 pictures? Are the sides sloped, or are they kind of
12 straight -- more straight up and down?

13 A. In the pictures they're more of a straight up and
14 down, steep drop off.

15 Q. Okay. And from the road to down to the creek is
16 that kind of a steep area?

17 A. Yes, ma'am.

18 Q. Okay. Rocky?

19 A. Yes, ma'am.

20 Q. A lot of brush?

21 A. Yes, ma'am.

22 Q. Okay. Broken concrete and bricks and mortar?

23 A. To name a few.

24 Q. Okay. And just basically some trash and broken
25 limbs, that sort of thing?

1 A. Yes, ma'am.

2 Q. Okay. And about how -- how tall or how -- from
3 the -- from the water all the way up to the road, about how
4 much distance is that?

5 A. Six feet.

6 Q. Okay.

7 A. Somewhere around six feet.

8 Q. And from the road to -- well, kind of describe as to
9 the side of the road what sort of area -- does it drop off
10 steeply, is it just kind of jagged, that sort of thing?

11 A. On which side of the road?

12 Q. On the side of the road that goes to the creek, I'm
13 sorry?

14 A. The creek goes directly under the road.

15 Q. Okay.

16 A. On either side -- on the right side there's a really
17 large concrete or steel pipe to let the water run through.
18 It's fairly steep on either side of the road, jagged and
19 steep with rocks.

20 Q. Okay. And where the ground drops off, we've got the
21 level area --

22 A. Uh-huh.

23 Q. -- where the road is, and where the ground drops off
24 to where the water starts, it's not -- it's not exactly
25 straight up and down?

1 A. Not exactly.

2 Q. Okay. Can you tell me what kind of distance
3 horizontally it would be from the edge where it starts going
4 down to where the water actually is? How much distance --

5 A. Wide?

6 Q. -- wide would you have to cover?

7 A. Directly over the steel pipe, you know, you can
8 step -- just step straight off maybe a few inches.

9 Q. Okay.

10 A. Other parts you can walk to the creek, walk beside
11 the creek and still be on the road and it be as much as two
12 feet.

13 Q. Okay. Back to when you were talking with Jim, did
14 he tell you how -- how the gunshot happened?

15 A. No, ma'am.

16 Q. Okay. Did he tell you if it was an accident or not?

17 A. He did state that it was an accident.

18 Q. Okay. Did he give you any more details than that of
19 it being an accident?

20 A. The only thing that I recall him saying was it just
21 went off, it was an accident.

22 Q. And he was talking about the gun?

23 A. That's what I --

24 Q. You assumed?

25 A. What I assume, yes, ma'am.

1 Q. Now, after you talked with him, did you go back
2 outside?

3 A. Yes, ma'am.

4 Q. Okay. And you told the other officers what Mr.
5 Murphy had said?

6 A. I pulled Gary Rose to the side and told him.

7 Q. Okay. And then what happened?

8 A. Gary asked me where the creek was and asked me if I
9 knew how to get there because he wasn't familiar with the
10 area.

11 Q. Okay. And is that creek in Van Zandt County?

12 A. Yes, ma'am.

13 Q. And he's a sheriff of Van Zandt County; is that
14 right?

15 A. Yes, ma'am.

16 Q. Okay.

17 A. Deputy.

18 Q. What?

19 A. A deputy.

20 Q. A Deputy sheriff.

21 A. Yes, ma'am.

22 Q. So did you take him out to that location?

23 A. I rode with him.

24 Q. Okay. And you directed him where to go?

25 A. Yes, ma'am.

1 Q. Was anybody else with you?

2 A. Joey Branch.

3 Q. And once you got out there, what did you see?

4 A. Jim had given specific directions on where we would
5 find the deceased. And when we got out of the car, Gary
6 stopped right in the middle of the creek pretty much. I was
7 in the passenger side, and I walked around to the front. He
8 got out of the driver's side and kind of walked back to start
9 at the edge of the creek and just -- I kind of assume walk it
10 and look in the ditch from one side to the other. By the
11 time I got to the front of the car and he got right at the
12 middle, we both kind of met -- our lights met on the same --
13 at the same time.

14 Q. Okay. And from the road where you were standing --
15 were you standing on the road at this point?

16 A. The edge of the road.

17 Q. The edge of the road. From the road how far exactly
18 were you from where Ms. Cunningham was found? Or where her
19 body was?

20 A. Roughly six feet. She was right on the very edge of
21 the creek.

22 Q. Okay. And was -- that time was the current in the
23 water, was it running fast or slow, or do you remember?

24 A. I believe it was slow.

25 Q. Okay. Let me ask you since you've been out there,

1 in your opinion could you drop -- could somebody drop a body
2 from the road or the edge of the road down into the creek
3 without going down the bank?

4 MR. DAVIS: I'm going to object to that. It
5 calls for speculation on the part of this witness.

6 THE COURT: Can you answer that without
7 speculating?

8 THE WITNESS: Yes, sir, I believe I can.

9 THE COURT: Objection is overruled. You may
10 answer the question.

11 A. I believe it would be very possible.

12 Q. (By Ms. Balido) Okay. Let me ask you this, when --
13 when Jim told you that Ms. Cunningham was at Livingston
14 Hill -- and he gave you very specific instructions; is that
15 correct?

16 A. Yes, ma'am.

17 Q. He was helpful and cooperative with you to kind of
18 tell you where to go?

19 A. Yes, ma'am. Yes, ma'am.

20 Q. Did you have a question in your mind about -- well,
21 did you know about what size of a woman Ms. Cunningham was at
22 that point?

23 A. I believe Deputy Branch, he was one of the officers
24 at the Dairy Queen, and I believe he had told me she was
25 roughly a 150 pounds.

1 Q. And you know what size the defendant is?

2 A. Yes, ma'am.

3 Q. Okay. And what did you think about -- when he told
4 you that she was at Livingston Hill in the creek --

5 A. Uh-huh.

6 Q. -- did you have any concerns in regard to how she
7 ended up there?

8 A. Yes, ma'am.

9 Q. Okay. And what was your concern about that?

10 A. That's a lot of weight for one man to have to pick
11 up.

12 Q. Did you talk about this with the defendant?

13 A. Yes, ma'am.

14 Q. And what did you ask him?

15 A. If anybody had helped him.

16 Q. And what was his response to that?

17 A. He had no response. The first time I asked him he
18 just kind of looked away as he did in the beginning. I asked
19 him again and he said that he had help, but he wasn't saying
20 anything.

21 Q. Okay. Did you ask him specifically if Treshod
22 Tarrant had helped him?

23 A. I don't recall if I specifically asked of any names.

24 Q. Okay. But this was still -- he was sitting in
25 Treshod's house?

1 A. Yes, ma'am.

2 Q. Did he ever tell you the name of the person that
3 helped him?

4 A. No.

5 MS. BALIDO: Pass the witness.

6 Cross-Examination

7 By Mr. Davis:

8 Q. Jason, you and I have met before, haven't we?

9 A. Yes, sir.

10 Q. Do you remember when I came down to Edgewood and met
11 with you and you actually took me out to the creek where the
12 body was found?

13 A. Yes, sir.

14 Q. This has been a really difficult situation for you
15 personally, hasn't it?

16 A. Yes, sir.

17 Q. Jason, besides being classmates with the defendant,
18 you actually were friends with him at one point, weren't you?

19 A. Yes, sir.

20 Q. Y'all would socialize after school?

21 A. Yes, sir.

22 Q. Correct?

23 A. Yes, sir.

24 Q. You knew his family, the Murphys down there?

25 A. Yes, sir.

1 Q. In Edgewood, I suppose? Did the -- did the
2 defendant have a brother while he was living with the Murphys
3 by the name of Matt Murphy?

4 A. Yes, sir.

5 Q. Jason, as I understand your testimony, when Deputy
6 Rose came out of the house and spoke with you, he told you
7 right then and there that he had given the defendant his
8 Miranda warnings, didn't he?

9 A. Yes, sir.

10 Q. And you remember that Deputy Rose told you that in
11 his opinion that the defendant had been lying to him?

12 A. Yes, sir.

13 Q. And that Deputy Rose actually asked you to go in and
14 speak with the defendant to try to get a possible location
15 for Ms. Cunningham's body, didn't he?

16 A. Exactly.

17 Q. And you agreed to do so partly because of your
18 status as a police officer, partly because you knew the
19 defendant?

20 A. Yes, sir.

21 Q. Now, when you went in there and started speaking
22 with the defendant, he appeared to understand everything that
23 you told him, didn't he?

24 A. Yes, sir.

25 Q. He didn't have any problems at all communicating

1 with you, did he?

2 A. No, sir.

3 Q. At any time did you feel like he was impaired to the
4 degree that he couldn't understand or take part in the
5 conversation with you?

6 A. No, sir.

7 Q. When he did start answering you, without going into
8 whether you believed him or not, at least his responses were
9 appropriate for what you were asking him, weren't they?

10 A. I believe so.

11 Q. Now, when you first started talking with him, you
12 eventually got around to discussing, I guess, what had
13 happened to your -- to your friend. Now, did the defendant
14 know about those circumstances?

15 A. Yes, sir.

16 Q. So when you talked about your friend being left out
17 for the animals to feed off of, I mean that was a
18 circumstance that Jedidiah Murphy was already aware of,
19 wasn't he?

20 A. Yes, sir.

21 Q. About how your friend -- your mutual friend had
22 actually been exposed to animals?

23 A. Yes, sir.

24 Q. Then he began to give you the location, didn't he?

25 A. Yes, sir.

1 Q. And in fact he gave you great detail about this
2 location, isn't that right?

3 A. Yes, sir.

4 Q. Not only did he tell you that it was at Livingston
5 Hill, but then you remember asking him is she on the road or
6 not?

7 A. Yes, sir.

8 Q. And he told you, didn't he, that, no, she's not on
9 the road, correct?

10 A. Correct.

11 Q. Did he then tell you that she was in the creek?

12 A. Yes, sir.

13 Q. You remember asking him whether or not that would be
14 on the right-hand side or the left-hand side of the road?

15 A. Yes, sir.

16 Q. And do you remember the defendant was able at that
17 time to tell you that she would be found on the left side of
18 the road?

19 A. Yes, sir.

20 Q. So when you went out there, I suppose you had a very
21 good idea where you would eventually find Ms. Cunningham's
22 body, didn't you?

23 A. Yes, sir.

24 Q. Now, you were familiar with Livingston Hill, weren't
25 you?

1 A. Yes, sir.

2 Q. The defendant was also, wasn't he?

3 A. Yes, sir.

4 Q. As a matter of the fact, that was one of the places
5 when y'all were in high school where the kids would go out
6 and drink from time to time, wasn't it?

7 A. Yes, sir.

8 Q. So in his experience, Jedidiah Murphy had been out
9 there, he had been drinking and socializing with friends at
10 the very spot where Ms. Cunningham's body was found; isn't
11 that right?

12 A. Yes, sir.

13 Q. How would you -- how would you describe Livingston
14 creek there at that point? Is that a place -- for instance,
15 is that a place where people will dump trash?

16 A. Yes, sir.

17 Q. As a matter of fact, isn't there a no dumping sign
18 near the point where Ms. Cunningham's body is found out
19 there?

20 A. Yes, sir.

21 Q. Jason, while you were -- while you were out there --
22 while you were out there, you saw the body in the water,
23 didn't you?

24 A. Yes, sir.

25 Q. Did you also see a turtle?

1 A. Yes, sir.

2 Q. If you would, please tell the members of the jury
3 what you observed with regards to Ms. Cunningham's body and
4 the turtle while you were out there at the scene?

5 A. There was a large turtle eating Ms. Cunningham's
6 flesh on her face and on her left hand.

7 Q. Okay. Did -- when you saw that happening, did you
8 have any thoughts about what to do about that at that point?

9 A. I contemplated anything I could do, but I didn't
10 really know what to do.

11 Q. Were you -- were you concerned that if you tried to
12 destroy the turtle, for instance, that it might interfere
13 with the crime scene?

14 A. Yes, sir.

15 Q. Later did you determine just how big that turtle
16 was?

17 A. I had later knew that the turtle had came from an
18 area lake. Another friend had caught it and told me that he
19 had dumped it out there about three days earlier.

20 Q. How much did that turtle weigh?

21 A. Roughly 80 pounds.

22 Q. 80 pounds?

23 A. Yes, sir.

24 Q. With how that body got in the creek, have you ever
25 seen a man tried to dispose of a body after he committed a

1 capital murder?

2 A. No, sir, I haven't.

3 Q. When you went in there to talk with the defendant,
4 had you ever interviewed somebody who was being charged with
5 capital murder and a possible death penalty?

6 A. No, sir.

7 Q. With regards to the defendant's use of alcohol,
8 you've seen him use alcohol on several occasions, haven't
9 you?

10 A. Yes, sir.

11 Q. Defendant started using as a teenager, didn't he?

12 A. Yes, sir.

13 Q. Would you say he's got a fairly high tolerance for
14 alcohol?

15 A. In school when I was with him and I would see him
16 drink, I would say it would be about average. I don't know
17 about high.

18 Q. Once you left now, you actually left the high school
19 in the 10th grade; is that right?

20 A. Yes, sir.

21 Q. The defendant remained in the high school, correct?

22 A. Yes, sir.

23 Q. Had y'all -- had y'all stayed in contact really
24 after he left high school or had y'all kind of separated
25 there for a period of time?

1 A. Football games, we'd still see each other at
2 football games, get-togethers down at Livingston Hill after
3 football games and things like that, we would see each other
4 there.

5 Q. Jason, when I talked with you down there in
6 Edgewood, did you tell me that you prefer not to testify in
7 this case unless you absolutely had to?

8 A. Yes, sir.

9 MR. DAVIS: Thank you. I'll pass the witness,
10 Your Honor.

11 MS. BALIDO: I don't have anything further,
12 Judge.

13 THE COURT: Thank you. You may step down,
14 sir.

15 Sheriff, let's take a short break.

16 THE BAILIFF: All rise.

17 (Jury placed on recess.)

18 THE BAILIFF: All rise.

19 (Jury returned to courtroom.)

20 MR. DAVIS: Your Honor, I'm sorry, can we
21 approach the bench, please, in anticipation of this
22 testimony.

23 (Side bar discussion off the record.)

24 THE COURT: Sheriff, will you retire the jury.

25 Ask counsel in the future when they anticipate a

1 discussion at the bench, that they would apprise opposing
2 counsel so the jury will not be further inconvenienced.

3 (Jury excused from courtroom.)

4 THE COURT: Visitors may be seated.

5 Witness come forward, please.

6 MS. BALIDO: For purposes of this hearing, the
7 defense would call Edward Hueske.

8 THE COURT: Raise your right hand.

9 (Witness sworn.)

10 THE COURT: Putting counsel on notice for both
11 sides that should this matter happen again, the Court will be
12 inclined to disallow the testimony of the witness.

13 MR. DAVIS: May I proceed --

14 THE COURT: The jury has been inconvenienced
15 beyond belief, and I am very, very upset of their treatment.

16 You may proceed, counsel.

17 MR. DAVIS: Thank you.

18 EDWARD HUESKE

19 was called as a witness by the State and, after having been
20 first duly sworn, testified as follows:

21 Direct Examination

22 By Mr. Davis:

23 Q. Sir, would you please tell me your name?

24 A. Edward Hueske.

25 Q. And, Mr. Hueske, as I understand, you've been hired

1 by the defense to render certain expert opinions in this
2 matter; is that correct?

3 A. That's correct.

4 Q. Sir, will you tell me what opinions you intend to
5 talk about in the presence of this jury during this case?

6 A. The reasons for unintentional discharge of firearms.

7 Q. If you would, just tell me what testimony you intend
8 to offer in that regard in front of this jury.

9 A. That it is in fact possible for a firearm to be
10 unintentionally discharged as a result of a number of
11 factors.

12 Q. Are you going to give those factors to the jury?

13 A. Yes, sir.

14 Q. Please give them to me, then.

15 A. One would be the result of person holding a firearm
16 and in the process losing their balance. As a result of
17 losing their balance, pressure can be implied to the trigger
18 by the trigger finger. Another reason would be a person
19 holding a firearm pointing it at someone and is startled.
20 The result of that circumstance can also result in an
21 unintentional discharge. And finally the third factor that
22 comes into play in unintentional discharge of weapons is
23 so-called sympathetic reaction which is the result of having
24 a firearm in one hand and carrying out some manipulation with
25 the opposite hand. And there is a sympathetic muscle

1 response to the hand holding the firearm that can result in
2 unintentional discharge.

3 Q. Okay. Besides the general nature of your testimony
4 concerning these three possible reasons for an unintentional
5 discharge of a weapon, do you anticipate that you'll be asked
6 any questions concerning your opinions of what occurred in
7 this case?

8 A. No, sir.

9 Q. So as I understand, the only opinions that you will
10 then render in front of this jury will be that there are --
11 first, there are several possible reasons for an
12 unintentional discharge of a firearm, correct?

13 A. That's correct.

14 Q. And that you will then list essentially these three
15 reasons and perhaps give additional detail about them; is
16 that correct?

17 A. That's correct.

18 MR. DAVIS: With that understanding, that's
19 all I have, Your Honor.

20 THE COURT: Do you have anything further?

21 MS. BALIDO: No, Judge.

22 THE COURT: Sheriff, may we have the jury.

23 THE BAILIFF: All rise.

24 (Jury returned to courtroom.)

25 THE COURT: Let the record reflect the jury is

1 returning to the courtroom at this time.

2 Members of the jury, you may be seated.

3 Mr. Murphy, counsel, visitors, you may be seated.

4 Raise your right hand, please. Sworn in before the
5 jury.

6 (Witness sworn.)

7 THE WITNESS: It will.

8 THE COURT: Thank you.

9 EDWARD HUESKE

10 was called as a witness by the Defendant and, after having
11 been first duly sworn, testified as follows:

12 Direct Examination

13 By Ms. Balido:

14 Q. Can you please state your name for the ladies and
15 gentlemen of the jury?

16 A. My name is Edward Hueske.

17 Q. And, Mr. Hueske, how are you employed, sir?

18 A. I'm self-employed as a consulting forensic
19 scientist. I'm also on the faculty of the University of
20 North Texas in Denton in the Department of Criminal Justice.
21 And I'm also a training coordinator for the University of
22 North Texas Police Academy in Denton, which is a regional
23 police training facility providing training for police
24 recruits and also in-service training for experienced police
25 officers. I also conduct training seminars for police

1 agencies, both in this country and abroad.

2 Q. And how long have you been doing independent or
3 private forensic consulting?

4 A. Approximately five years.

5 Q. And what is your educational background?

6 A. I hold a Bachelor of Science degree in chemistry
7 from Sam Houston State University, also have a Masters degree
8 in chemistry from Sam Houston State University. And I've
9 done post-graduate work at the University of Texas at Austin,
10 Texas Christian University, and Sam Houston State University.

11 Q. And what do you do to prepare to teach in the
12 Criminal Justice Department of the University of North Texas
13 and also at the police academy?

14 A. Well, my preparation is my nearly 28 years
15 experience as a forensic scientist with law enforcement
16 agencies comprising 23 years of that experience. I've taken
17 numerous training seminars over my 28 years from agencies
18 such as the Federal Bureau of Investigation, the Bureau of
19 Alcohol, Tobacco, and Firearms, the International Association
20 for Identification, the American Academy of Forensic
21 Sciences, Association of Firearm and Toolmark Examiners, and
22 other similar professional forensic organizations.

23 Q. And in your experience, Mr. Hueske, have you had the
24 opportunity to train police recruits, I guess I'll call them,
25 on the proper way to handle their firearms?

1 A. Yes, I have.

2 Q. Let me ask you just specifically about something
3 that is a concern, or can I ask you is there a concern in
4 training of police recruits about what is called
5 unintentional discharge?

6 A. Yes.

7 Q. And can you tell me what the term "unintentional
8 discharge" of a weapon means to you in a forensic setting,
9 forensic criminalist setting?

10 A. Well, I think the term is pretty well self
11 explanatory. It simply means discharging a weapon without
12 intending to.

13 Q. And is that a concern with police recruits so that
14 they're trained certain ways to kind of keep from that
15 happening?

16 A. Yes.

17 Q. First let's kind of go over what -- what -- well, I
18 mean, basically guns just don't go off; is that correct?

19 A. That's correct.

20 Q. Okay. Can you explain how there could be an
21 unintentional discharge of a weapon?

22 A. Well, if we eliminate things like dropping a weapon
23 or a weapon being struck by something and we limit the
24 discussion strictly to a weapon in someone's hand with their
25 finger on the trigger and talk about that, there are several

1 ways that a weapon could be unintentionally discharged in
2 that scenario. If someone is holding a weapon and again,
3 their finger has to be on the trigger obviously, and is
4 holding the weapon and is startled, it's possible and
5 documented that the reaction to being startled can cause them
6 to unintentionally pull the trigger, fire the weapon. If
7 someone --

8 Q. Let me stop you right there just for a second. So
9 you're saying if someone is startled, that the act of being
10 startled itself can cause the person to discharge the weapon
11 unintentionally?

12 A. It can, yes.

13 Q. Actually pull on the trigger?

14 A. Yes.

15 Q. Say like a police officer walking into a house and
16 is startled by someone in there?

17 A. That's correct.

18 Q. Okay. And what is the second way that this
19 unintentional discharge can be -- can happen?

20 A. Well, the second way is something that happens
21 fairly frequently in hunting accidents in particular. And
22 that is when someone is holding a weapon -- again, understand
23 that you would have to have your finger on the trigger, and
24 they lose their balance. And as they loose their balance and
25 try to catch themselves, they can unintentionally squeeze the

1 trigger, fire the weapon that way.

2 Q. And what's the third way also that this
3 unintentional discharge can happen?

4 A. The third way is what's known as sympathetic
5 firing. This results when a person is holding a weapon with
6 one hand and then carries out some manipulation with the
7 other hand and basically the brain sends signals to both
8 hands and they intend to grab or squeeze, shove or push with
9 one hand, and it's the opposite hand that also gets part of
10 the brain signal. And this is what's known as sympathetic
11 firing. And the trigger can be squeezed unintentionally that
12 way.

13 Q. And this last one I want to talk about just for a
14 second is -- are there certain ways that you train police
15 officers to keep them from being in the situation where this
16 sympathetic constriction of muscles won't occur and they
17 won't accidentally or unintentionally discharged their police
18 weapon?

19 A. Yes.

20 Q. Okay. And what usually is the training that is
21 involved with that?

22 A. Well, there are a couple of things. First of all,
23 officers are taught not to carry out manipulations where
24 they're holding their weapon on someone and then grab them.
25 But another situation would be or another part of the

1 training would be it's absolutely essential to keep the
2 finger off of the trigger. Just that simple, because of the
3 possibility.

4 Q. Okay. And then also they're also taught just to --
5 if there's some manipulation that they have to do, then
6 they'll just holster the weapon before they do that?

7 A. That's correct.

8 Q. And is that because of the danger of this
9 sympathetic muscle movement is that great that we don't want
10 that sort of thing to happen?

11 A. That's correct.

12 MS. BALIDO: I pass the witness.

13 Cross-Examination

14 By Mr. Davis:

15 Q. Mr. Hueske, I guess the first time that you and I
16 had a chance to meet was last Friday, wasn't it?

17 A. Yes, sir.

18 Q. Do you remember I guess that you were on your way up
19 to my office at that time, correct?

20 A. Yes.

21 Q. And on Friday were you given an opportunity to view
22 all of the photographs concerning this case which were in my
23 possession?

24 A. Yes, sir, I was.

25 Q. Specifically you had a chance to look at all the

1 autopsy photographs, I take it?

2 A. Yes, sir.

3 Q. Crime scene photographs?

4 A. Yes, sir.

5 Q. Did you also have a chance to review the photographs
6 that had been taken of a Honda Accord?

7 A. Yes, I did.

8 Q. Were you also given access to the physical evidence
9 that was in our possession?

10 A. Yes, sir, I was.

11 Q. And did you have a chance to review that and to look
12 through and examine that?

13 A. I was given that opportunity, yes.

14 Q. Mr. Hueske, I take it from what you've told Ms.
15 Balido you've testified several times in matters such as this
16 one, haven't you?

17 A. I have.

18 Q. As a forensic expert; is that correct?

19 A. That's correct.

20 Q. Do you also do crime scene reconstruction work?

21 A. Yes, I do.

22 Q. As I understood your testimony, Mr. Hueske, in all
23 three of the possibilities for an unintentional discharge of
24 a firearm, the individual's finger would actually have to be
25 on the trigger of the firearm at some point; is that correct?

1 A. In order for it to fire, that's correct.

2 Q. Normally on a pistol or other firearm, is there
3 what's called a trigger guard?

4 A. Yes, there is.

5 Q. And could you just briefly describe for the members
6 of the jury what a trigger guard is and how it functions on a
7 firearm?

8 A. It's a piece of metal that encircles the trigger.
9 It's there to prevent accidental firing from dropping or
10 something striking the hammer so that in order to fire, one
11 has to place their finger inside the trigger guard and
12 against the trigger.

13 Q. And that would have to take place in all three of
14 these scenarios that we've just talked about before the
15 firearm will actually discharge, correct?

16 A. That's correct.

17 Q. I want to ask you now with regard to the autopsy
18 photographs, did you also have access to the autopsy itself
19 in this case? Have you had a chance to review that?

20 A. The autopsy itself, I was not present for.

21 Q. The autopsy report in this case?

22 A. Oh, I'm sorry. I have not reviewed that.

23 Q. Okay. When you looked at the autopsy photographs in
24 this particular case, did you come to a conclusion that the
25 gunshot wound suffered by Ms. Cunningham was in fact a loose

1 contact shot?

2 A. The photograph that I viewed was consistent with
3 that, yes.

4 Q. Based upon what -- what did you observe in that
5 photograph that led you to that conclusion?

6 A. There was a lack of what's known as powder stippling
7 around the margins of the wound, which is a consequence of
8 the muzzle being very close to the skin surface, so that the
9 gunpowder particles would go into the wound track as opposed
10 to striking the skin around the wound if the barrel were
11 further back.

12 Q. So in this particular case, is it your opinion that
13 the firearm that produced that gunshot wound was in fact up
14 really in proximity to Ms. Cunningham's forehead at the time
15 that it was discharged and fired into her?

16 A. That's the way it appears to me.

17 Q. Thank you, sir.

18 MR. DAVIS: I'll pass the witness.

19 THE COURT: Ms. Balido.

20 MS. BALIDO: Nothing further, Judge.

21 THE COURT: May this witness be excused,
22 subject to recall?

23 MS. BALIDO: No objection.

24 THE COURT: Either side any objection?

25 MR. DAVIS: No objection, Your Honor.

1 THE COURT: Thank you, Mr. Hueske. You are
2 excused, sir.

3 Defense may continue.

4 MS. BALIDO: Judge, I believe that we will
5 proceed after lunch.

6 THE COURT: Lunch break.

7 Ladies and gentlemen, there is a witness that I have
8 previously been notified will not be available until 1:30 --
9 1:00, 1:30.

10 MR. BYCK: Probably 1:30.

11 MS. LITTLE: It is definitely 1:30.

12 THE COURT: See you at 1:30.

13 (Recess of proceedings.)

14 THE COURT: Let the record reflect this
15 hearing is being conducted in open court, outside the
16 presence and hearing of the impaneled jury, the one
17 alternate. Let the record further reflect the defendant,
18 Jedidiah Isaac Murphy, is in court and will be at all times
19 during this hearing, absent my dictating the contrary into
20 the record.

21 Ask that you raise your right hand, Doctor.

22 (Witness sworn.)

23 THE COURT: Thank you. You may lower your
24 hand.

25 THE WITNESS: Thank you, sir.

1 THE COURT: 705 hearing at the request of the
2 State.

3 Mr. Davis, you may proceed.

4 MR. DAVIS: Thank you.

5 NIZAM PEERWANI

6 was called as a witness by the State and, after having been
7 first duly sworn, testified as follows:

8 Direct Examination

9 By Mr. Davis:

10 Q. Sir, would you please tell us your full name?

11 A. My name is Nizam Peerwani, P-e-e-r-w-a-n-i,
12 N-i-z-a-m.

13 Q. Dr. Peerwani, I understand that you're the Chief
14 Medical Examiner of Tarrant County, correct?

15 A. Yes, sir.

16 Q. I don't believe that we've ever met, have we?

17 A. I don't think, sir.

18 Q. My name is Greg Davis. I'm representing the State
19 of Texas in this matter.

20 Dr. Peerwani, I understand you'll be called this
21 afternoon to render certain opinions in this case; is that
22 correct?

23 A. Yes, sir.

24 Q. If you would, let's go through the opinions that you
25 intend to express to this jury. Can you tell me what you

1 intend to testify to this afternoon?

2 A. Well, one thing that I've discussed with the defense
3 counsel is the issue of drowning, whether the decedent, Betty
4 (sic) Cunningham drown or didn't drown. So that's one area
5 that I intend to address.

6 Q. Okay. What -- what opinion do you intend to express
7 on that matter?

8 A. I intend to say that in fact that there is no way
9 scientifically you can say she drowned. To say that she
10 possibly drowned is mere speculation.

11 Q. So I understand what you'll say, there's no
12 scientific way to say that she's drowned in this particular
13 case; is that right?

14 A. Yes, sir.

15 Q. Okay. Can you tell me what the next opinion will be
16 that you're going to render to this jury?

17 A. I think that the issue that we are going to talk
18 about is specifically that and talk about the autopsy itself
19 as well as what is the purpose of autopsy in general.

20 Q. Okay. So -- so you intend to talk about the general
21 procedures used for autopsies, the purpose of an autopsy,
22 correct?

23 A. Yes, sir.

24 Q. With regards to the autopsy report that was prepared
25 in this case, do you intend to express any opinions about the

1 autopsy that was conducted in this particular case?

2 A. No, sir. I would not venture an opinion as to
3 whether or not this is adequate or inadequate, just basically
4 an autopsy report that I have reviewed.

5 Q. Any other opinions that you -- that you intend to
6 express this afternoon?

7 A. Well, anything that the defense counsel raises at
8 this point. These are the only areas I'm aware of.

9 Q. Okay. Do you anticipate that you'll be expressing
10 some opinion about the time of death in this case?

11 A. Yes. If I'm asked about the mechanisms of death
12 after gunshot injury and how rapidly an individual dies, I
13 would render an opinion on that matter.

14 Q. What would that opinion be?

15 A. That opinion basically would be that with a small
16 caliber gunshot wound, one can't precisely say how long after
17 the gunshot a person could stay alive and there is no
18 scientific way to be certain as to exactly when death occurs.

19 Q. Do you expect to render some sort of opinion about
20 the possible range of time that an individual could live as a
21 result of this type of gunshot wound?

22 A. I would give a general parameters, but nothing very
23 specific.

24 Q. What general parameters would you give?

25 A. I would say that with a small caliber gunshot wound,

1 a person would stay alive in the manner in which she was
2 inflicted injury, a few hours but not days.

3 Q. In order to -- first of all, any other opinions that
4 you're aware of at this time, Doctor?

5 A. No, sir.

6 Q. In reaching those opinions, can you tell me what
7 material have you used in order to form your opinions?

8 A. Well, it's based on experience, training, education,
9 as well as certification in forensics.

10 Q. In this particular case, have you reviewed -- have
11 you reviewed any photographs provided to you by the defense?

12 A. Yes, sir.

13 Q. Do those photographs show Ms. Cunningham in water?
14 Do you recall those?

15 A. Yes, sir, I saw two photographs with Ms. Cunningham
16 in water.

17 Q. Have you reviewed any other photographs? For
18 instance, have you reviewed the autopsy photographs in this
19 case?

20 A. Yes, sir.

21 Q. Have you reviewed any other materials provided to
22 you by the defense in this matter?

23 A. I have reviewed the autopsy report that was provided
24 to me.

25 MR. DAVIS: I believe that's it, Judge.

1 THE COURT: Defense have anything?

2 MR. BYCK: I have no questions.

3 THE COURT: Sheriff, may we have the jury.

4 THE BAILIFF: All rise.

5 THE COURT: Let the record reflect the jury is
6 returning to the courtroom at this time.

7 (Jury returned to courtroom.)

8 THE COURT: Ladies and gentlemen of the jury,
9 you may be seated.

10 Mr. Murphy, counsel, visitors in the gallery, you
11 may be seated.

12 Ladies and gentlemen, this witness has previously
13 been sworn in, hearing conducted immediately prior to your
14 returning to the courtroom. I assure you he is under oath.

15 DR. NIZAM PEERWANI
16 was called as a witness by the Defendant and, after having
17 been first duly sworn, testified as follows:

18 Direct Examination

19 By Mr. Byck:

20 Q. Sir, would you state your name for the Court?

21 A. My name is Nizam Peerwani.

22 Q. And you are a medical doctor?

23 A. Yes, sir.

24 Q. Dr. Peerwani, how are you employed?

25 A. I'm employed as a medical examiner for the counties

1 of Tarrant, Parker, and Denton in the State of Texas.

2 Q. And are you the Chief Medical Examiner of Tarrant
3 County?

4 A. Yes, sir.

5 Q. Sir, what education and experience, training, and
6 qualifications do you have to hold that post?

7 A. I did my undergraduate schooling for the American
8 University, graduating with a B.S. in biology and chemistry
9 in '72, and an M.D. in '76. I then did four years of
10 post-graduate training in pathology at Baylor Hospital here
11 in Dallas. I'm a board certified pathologist with
12 certification in anatomic, clinical, and forensic pathology.
13 And I've been practicing forensic pathology for the past 22
14 years.

15 Q. Doctor, in those past 22 years, do you have any idea
16 how many autopsies you've performed?

17 A. Probably over seven to eight thousand.

18 Q. Seven to eight thousand?

19 A. Yes, sir.

20 Q. All right, sir. Doctor, you have been previously
21 provided an autopsy that has been introduced into evidence on
22 a Bertie Cunningham; is that correct?

23 A. Yes, sir.

24 Q. And you have had occasion to read that autopsy
25 report as well as review the photographs which likewise have

1 been introduced into evidence --

2 A. Yes, sir.

3 Q. -- in this case?

4 A. Yes, sir.

5 Q. Doctor, I'd like to ask you what is the purpose of
6 an autopsy?

7 A. What an autopsy is is a postmortem exam, and the
8 purpose of autopsies are to adjudicate on the cause of death
9 and reach conclusion on the manner of death.

10 Q. And your job as a medical examiner, aside from
11 performing autopsies, would be?

12 A. To decide as to what the person died of and to make
13 a ruling whether this is a natural or an unnatural death.

14 Q. Is it further part of your job to regularly appear
15 in courts of law and testify?

16 A. Yes, sir.

17 Q. Now, Doctor, in this -- in this procedure where you
18 conduct an autopsy and you return a report and you testify,
19 are you a law enforcement agent or a member of the District
20 Attorneys Office or member of any law enforcement agency at
21 all?

22 A. Well, in Texas a medical examiner is independent of
23 the District Attorneys Office or the law enforcement. And
24 the medical examiner is -- is appointed under the statutory
25 definition of Article 49.25, and he's an independent examiner

1 into the cause of death.

2 Q. And likewise, if you are independent of the District
3 Attorneys Office or any police or law enforcement
4 organization, are you also independent of any defense
5 organization, or anything of that nature?

6 A. Yes, sir.

7 Q. In other words, Doctor, it's your job to testify as
8 a neutral observer; is that correct?

9 A. Yes, sir.

10 Q. You're not to be partisan. You're not to take
11 sides; is that correct?

12 A. That's the general intention, yes, sir.

13 Q. All right, sir. In the autopsy report and the
14 photographs concerning the death of Ms. Bertie Cunningham,
15 contained therein is a -- at the very last page is a
16 statement by the examiners that based upon the investigation
17 report and autopsy findings, it is my opinion that Bertie
18 Cunningham, an 80-year-old white female, died of a gunshot
19 wound to the head, period. It then goes on to say it is
20 possible that she may have survived the gunshot wound to the
21 head for period of time and consequently drowning may have
22 contributed to her death.

23 Now, Doctor, you have seen the photographs, I
24 believe they're State's Exhibits 34 and 35, where the body of
25 Mrs. Cunningham was found in water?

1 A. Yes, sir.

2 Q. As an autopsy surgeon, would you put that drowning
3 was a possibility every time a body was found in water?

4 A. No, sir.

5 Q. In order to establish death by drowning, what
6 evidence would you look for in the human body in your
7 autopsy?

8 A. Well, there are certain positive findings that one
9 is to look for and establish and of course one is to make
10 sure there are no other intervening causes in a body or human
11 remains found in a body of water. Obviously, the positive
12 things that we do see in death by drowning is findings of
13 respiratory death. These findings include a severe
14 congestion of the lung, swelling or edema of the lung,
15 presence of large amounts of frothy food in the trachea or
16 the windpipe and the bronchioles, these are positive
17 findings. Then of course the presence of such fluid and
18 froth indicates that the person was still respiring. When
19 you say a person is still alive and then drowns, obviously he
20 or she is breathing and the air mixed with water will produce
21 all that. So these are positive findings.

22 Sometime one has to adopt other methods of trying to
23 decide if in fact this person drown in the water. One has to
24 do special studies and look for bone marrow findings of
25 drowning. And these are tedious methods and long and drawn

1 out and most medical examiners don't really do that. So we
2 basically look for positive findings.

3 The other thing of course is very important is to
4 see if there is any other intervening cause of death and if
5 that cause is present, could it have killed the person or
6 not. So in general we do that exercise every time we find a
7 body floating in water or drown in a lake or river.

8 Q. I see. Now, Doctor, in regards to Mrs. Bertie
9 Cunningham, you've read the autopsy report, taken a look at
10 the photographs, is there any evidence that suggests to you
11 that Mrs. Cunningham died by drowning in water?

12 A. No, sir. Obviously, the body was found submerged
13 and there is some wrinkling of the palms and soles which
14 implies the body was immersed in water, but the lung findings
15 really do not support that finding. So there are no positive
16 findings supporting that diagnosis.

17 Q. All right, sir. Now, further, you have read the
18 autopsy report regarding the loose contact wound to the head,
19 the path and track of the bullet, the -- the certain areas of
20 the brain that it went through. I believe it went through
21 the frontal area and some other areas before it came to rest
22 in another area; is that correct?

23 A. Yes, sir.

24 Q. And this was a small caliber .22 wound; is that
25 correct?

1 A. Yes, sir.

2 Q. Now, in terms of -- of trying to decide, if you can,
3 if there are any basis that you can decide whether that wound
4 was either immediately fatal or immediately rendered the
5 individual unconscious and then was fatal, or that the wound
6 did not immediately render the individual unconscious and the
7 individual was conscious and aware for any particular amount
8 of time, are there any standards or are there any procedures
9 or are there any techniques that you can use to determine the
10 answer to any one of those three questions? Whether the
11 death was immediate; unconsciousness was immediate, but the
12 death came later; or that conscious -- unconsciousness and
13 death were sometime after the infliction of the wound? Are
14 there any techniques that you can use to decide those
15 questions?

16 A. Well, I guess the most important thing to do is to
17 study the trajectory of the bullet and see through what parts
18 of the brain the bullet passed through. There are obviously
19 some parts of the brain that are vital for sustaining life.
20 And if these are severed or injured, then death can be very
21 rapid. On the other end, there are areas in the brain where
22 a person might not die instantaneously and maybe survive for
23 a while or days or months or years, depending upon the
24 injuries, so, yes, certainly one can examine the brain,
25 dissect the brain, and establish the track and then give a

1 predictive value based on past experiences and other learning
2 methods.

3 Q. Doctor, according to the track as described in the
4 autopsy report, assuming that those observations were
5 correct, what conclusions did you reach about the immediacy
6 of death or the immediacy of the individual being rendered
7 unconscious and then dying?

8 A. Well, I read a couple of things, counselor. The
9 first thing I did in fact carefully read about the track.
10 And the track does pass through the right side of the brain
11 into the left side and goes to the midline structures. I'm
12 not quite sure what the examiner meant by midline
13 structures. I suppose she probably meant that it was about
14 the middle of the brain. If in fact the midline structure
15 was the brain stem, then the death would have been very
16 rapid, because the brain stem is the main connecting pathway
17 of the brain to the spinal cord and when you sever that, the
18 person dies very rapidly. But on the other hand, as the
19 examiner, she reported that she found what is called
20 contusions of hippocampus gyrus. That implies that in fact
21 she survived a little bit. How long, I can't be sure.

22 Q. Doctor, let me stop you right there. It's your
23 conclusion then that it's possible that it was not an
24 immediate fatality, but it would be impossible for you to say
25 whether the individual survived 30 seconds, 2 minutes, 5

1 minutes, 10 minutes, 20 minutes, an hour, 4 hours, 12 hours?

2 Is that what you're saying?

3 A. Basically what I'm saying is that I -- I think from
4 the description that she has provided, I don't think that she
5 died instantaneously. Also based on the pictures that I saw,
6 I saw some contusion, ecchymosis of the right orbit or coon
7 eyes as we say, and this implies there was some functioning
8 of the heart, the heart was beating and the blood was seeping
9 blood into the tissues, so basically I agree with the
10 examiner, that it was not an instantaneous death, but I don't
11 believe she survived very long because the path of the bullet
12 is certain to an area of the brain called the ventricular
13 cavity and there an expanding hemorrhage would result in
14 death very soon within a few hours. I would predict not more
15 than six hours or so.

16 Q. Is there any way you could predict the consciousness
17 or the unconsciousness of the individual?

18 A. There are anecdotal stories of people sustaining
19 gunshot wounds and staying conscious, but in vast majority of
20 the cases that I've done and examined they lose consciousness
21 very rapidly, so based on that alone, I predict this person
22 lost consciousness very rapidly after sustaining the gunshot
23 wound.

24 Q. All right. Would you feel or would you not feel
25 that any prediction to any amount of time that individual who

1 suffered those profound wounds as expressed in that autopsy
2 report would be speculation?

3 A. I think that there is no scientific way to know in a
4 body that is partially decomposing and found in a creek to
5 give predictive time values in a precise fashion.

6 Q. All right. Is that a nice way of saying that
7 that -- that it would be speculation?

8 A. I would -- yes, sir, I would say it's speculation.

9 Q. All right. Doctor, my final question to you is, why
10 don't you include speculation in autopsy reports? I take it
11 from the tone and tenor of your comments that you don't
12 especially approve of speculation, where there is no physical
13 evidence or grounds for that speculation. Why don't you
14 include it?

15 A. I think it's all right for a medical examiner to
16 speculate when they are strategizing with the law enforcement
17 police agency, but I think that once you put it on a report,
18 it should be backed by scientific evidence.

19 MR. BYCK: Thank you, Doctor. Pass the
20 witness.

21 Cross-Examination

22 By Mr. Davis:

23 Q. Dr. Peerwani, we met for the first time this
24 afternoon; is that right?

25 A. That's right.

1 Q. Dr. Peerwani, in this case, as I take it, you had an
2 opportunity to view two crime scene photographs, correct?

3 A. Yes, sir.

4 Q. You've also reviewed the autopsy photographs?

5 A. Yes, sir.

6 Q. And you were also provided with a copy of the
7 autopsy report itself; is that right?

8 A. Yes, sir.

9 Q. Were -- were you given the testimony of Dr. Jennie
10 Duval that she provided to this jury yesterday?

11 A. No, sir.

12 Q. So you don't know what Dr. Duval has previously told
13 this jury about the nature and extent of the injuries or her
14 particular findings; is that right?

15 A. No, sir.

16 Q. You stated that all medical examiners in the State
17 of Texas are independent of law enforcement, correct?

18 A. Absolutely, sir.

19 Q. And that is absolutely the case with the Dallas
20 County Medical Examiners Office as well?

21 A. Absolutely right, sir.

22 Q. Have you ever met with Dr. Duval who is employed
23 with the Medical Examiners Office here in Dallas?

24 A. I may have met her. I go to a lot of meetings, and
25 I know of her, yes, certainly.

1 Q. Have you ever spoken with her in particular about
2 this particular case?

3 A. No, sir.

4 Q. So as I understand then with regards to what her
5 findings may or may not indicate, there has never been an
6 occasion where you've called her and said would you please
7 explain what you meant by this term or that term?

8 A. No, sir.

9 Q. Are you aware that Dr. Duval, for instance, when we
10 talk about the midline of the brain, are you aware that Dr.
11 Duval has previously told this jury that there was no injury
12 noted to the brain stem?

13 A. I wouldn't be surprised, and the reason is because
14 she described the hippocampus contusion so I would not
15 disagree with her.

16 Q. Would you agree with the statement that you would
17 expect Ms. Cunningham again not to die instantaneously, but
18 to survive for some period of time following this gunshot
19 wound?

20 A. I would have no quarrels with that at all, based on
21 the autopsy findings.

22 Q. And I believe that you previously told me that that
23 time period could range as high as a few hours, but certainly
24 not a few days; is that correct, also?

25 A. Yes, sir.

1 Q. The statement contained in the autopsy report on the
2 final page, on the conclusion: It is my opinion that Bertie
3 Cunningham, an 80-year-old white female, died of a gunshot
4 wound to the head.

5 Do you agree with that conclusion as to the cause of
6 death?

7 A. Absolutely. Yes.

8 Q. You -- you were telling us about some -- some
9 photograph or some evidence that you were able to look at
10 that led you to believe that Ms. Cunningham did not die
11 instantaneously. And I'm not sure that I quite understood.
12 Did it have something to do with one of her eyes?

13 A. Yes, sir. The orbits, which are the eye sockets
14 show a -- what we call contusions or hemorrhaging. These are
15 produced not because she was impacted there, but because of
16 the fracture of the roofs of the orbit. And the reason she
17 does have periorbital ecchymosis or periorbital contusions is
18 because she was alive for a short while or a longer while. I
19 can't be absolutely certain, so that is indicative that she
20 didn't die instantaneously.

21 Q. Dr. Peerwani, I want to now show you what I've
22 marked as State's Exhibit 126, ask you whether or not you
23 recognize that to be one of the autopsy photographs in this
24 case that you reviewed?

25 A. Yes, sir.

1 Q. In particular does that show the type of bruising to
2 the orbital area that you've just described for the members
3 of the jury?

4 A. Yes, sir.

5 MR. DAVIS: Your Honor, at this time we will
6 offer State's Exhibit 126.

7 (State's Exhibit No. 126 offered)

8 MR. BYCK: No objection to 126.

9 THE COURT: Admitted.

10 (State's Exhibit No. 126 admitted)

11 MR. DAVIS: May the witness step down.

12 THE COURT: You may.

13 THE WITNESS: Thank you, sir.

14 Q. (By Mr. Davis) Dr. Peerwani, if you don't mind,
15 would you please show this to -- this photograph 126 to the
16 jury and explain what you mean by the contusions and the
17 other injuries that you've just indicated?

18 A. What I was telling the counselor here was the area
19 of bluish discoloration of the eyelid, which is the left
20 upper eyelid and --

21 THE REPORTER: I'm sorry, Doctor, I cannot
22 hear you.

23 A. All right. I'll start over again.

24 THE REPORTER: The bluish discoloration of the
25 eyelid, you can continue there.

1 A. Yes. The bluish discoloration of the eyelid and
2 around the eye socket, and I'm pointing out on this State's
3 Exhibit 126 with my finger here.

4 Q. (By Mr. Davis) And again, that is some indication
5 to you that her heart remained beating for some period of
6 time to produce that type of bruising, correct?

7 A. Yes, sir.

8 Q. Doctor, I believe you had noted in your testimony
9 also that there were also some -- that you noticed some other
10 contusions to other extremities. Did you note that during
11 your review of the autopsy photographs?

12 A. Yes, sir.

13 Q. Showing you now State's Exhibit 62. Would it be
14 fair to say that State's Exhibit 62 shows the upper portion
15 of Ms. Cunningham's left arm?

16 A. That's right, sir.

17 Q. Okay. Would you dis -- would you agree or disagree
18 with the statement that these marks and the bruising were
19 produced prior to Ms. Cunningham's death?

20 A. Yes, they are consistent with what we call
21 antemortem injury.

22 Q. Which would mean they were produced at or near the
23 time of her death; is that correct?

24 A. Yes, sir.

25 Q. As opposed to being produced at a later time after

1 her death?

2 A. Yes, sir.

3 Q. State's Exhibit Number 61, I believe this will show
4 the upper chest area, as well as a portion of her right arm;
5 is that right?

6 A. Yes, sir.

7 Q. What would be your opinion about the timing of the
8 bruises here shown to the right portion of Ms. Cunningham's
9 body? Were they produced before her death or after her
10 death?

11 A. This is a little more difficult picture mainly
12 because of the fact that there is area of lividity which is
13 postmortem lividity. And in fact if she had sustained that
14 postmortem, the blood would seep and collect out and look
15 like an antemortem, so that's a hard one. I would probably
16 examine this more microscopically and confirm if this is an
17 antemortem or a postmortem.

18 Q. So could be either on this. You need to have -- you
19 personally, if you were doing the autopsy, would need a
20 little more information to work with?

21 A. Yes, sir.

22 Q. Finally, with regards to the gunshot wound itself, I
23 believe -- was it your testimony that you also agree this was
24 a loose contact gunshot wound?

25 A. That's right. I have no problem with that

1 definition or that description.

2 Q. Okay. And what is it about that photograph or the
3 findings in the autopsy report that lead you to believe that
4 it was in fact a loose contact gunshot wound?

5 A. What I'm basically seeing is a dense scorching and
6 soot or blackening around the defect, along the margins. I
7 don't see a muzzle imprint which implies that it is high
8 contact gunshot wound. I don't see tattooing which means
9 that it was held further away from the surface of the body.
10 And the description of loose contact is just good
11 description.

12 Q. And again, is it your testimony that you would agree
13 that the cause of death in this case is consistent with Ms.
14 Cunningham having been shot with a firearm?

15 A. That's right.

16 Q. And a firearm is a deadly weapon, is it not?

17 A. Yes, sir.

18 Q. With regards to the drowning, did I understand you
19 to say that there are some cases in which individuals die
20 from drowning where you do have positive findings that will
21 indicate that drowning was the primary cause of death?

22 A. Yes, sir.

23 Q. Are there some cases where an individual dies as a
24 result of drowning where there aren't any positive findings?

25 A. In the literature there is -- there is a type of

1 drowning described as dry drowning where the -- where the
2 mechanism of death is speculated as being laryngeal spasm or
3 spasm of the larynx and therefore the air does not enter the
4 lungs and as such the person does not have any frothy fluid
5 in the lungs. This has been in the literature for a long
6 time. I have yet to see a dry drowning during the past 22
7 years, so I don't believe in dry drowning at all personally,
8 but it's certainly mentioned. And I hope I answered your
9 question.

10 Q. Yes, sir, you did. Thank you, Doctor.

11 MR. DAVIS: I'll pass the witness.

12 MR. BYCK: I have no further questions, Your
13 Honor. May this doctor be excused to go back to Fort Worth?

14 MR. DAVIS: No objection.

15 THE COURT: Thank you. You are excused to go
16 back to Tarrant County.

17 THE WITNESS: Thank you, Your Honor.

18 THE COURT: You're welcome.

19 (Witness excused from courtroom.)

20 THE COURT: Sheriff, will you retire the jury,
21 please.

22 Ladies and gentlemen, I understand the next witness,
23 by cell phone, has indicated he's on his way.

24 (Jury retired from courtroom.)

25 THE COURT: Jury has been excused from the

1 courtroom.

2 THE BAILIFF: All rise.

3 (Jury returned to courtroom.)

4 THE COURT: Let the record reflect the jury is
5 returning to the courtroom at this time.

6 Members of the jury, you may be seated.

7 Mr. Murphy, counsel, visitors in the gallery, and
8 Doctor.

9 MR. BYCK: Thank you, Your Honor.

10 Your Honor, may the record reflect this witness has
11 been previously sworn.

12 THE COURT: The record so reflect.

13 DR. WILLIAM VANDIVER

14 was called as a witness by the Defendant and, after having
15 been first duly sworn, testified as follows:

16 Direct Examination

17 By Mr. Byck:

18 Q. Dr. Vandiver, my name is Michael Byck, and I
19 represent Mr. Murphy. You already have a copy of Defendant's
20 Exhibit Number 10. That's a initial neurological --
21 neurologic evaluation by Dr. John Claude Krusz, K-r-u-s-z; is
22 that correct?

23 A. Yes, sir.

24 Q. And also, sir, for your own reference, let me give
25 you State's Exhibit Number 69, that part being the record of

1 Dr. James Garrison, to you.

2 A. Yes, sir.

3 Q. Now, both these reports have to do with Jedidiah
4 Isaac Murphy; is that correct?

5 A. Yes, they do.

6 Q. And Dr. Garrison's report is dated September 7th of
7 the year 2000, to you?

8 A. Yes, sir.

9 Q. Correct. And Dr. Krusz' report is dated -- I don't
10 even know if there is a date on there.

11 A. There is --

12 Q. Yes, 6-1 of the year 2001, June the 1st, the year
13 2001. You've had an opportunity to examine Defendant's
14 Exhibit Number 10?

15 A. Yes, I have.

16 Q. Is that right?

17 A. Yes, sir.

18 Q. Needless to say, Doctor, as the jury already knows
19 and as you will soon find out, I have absolutely no medical
20 experience at all.

21 What does Dr. Krusz' report tell you that is any
22 different from Dr. Garrison's report?

23 A. Dr. Garrison's report did not note any -- any damage
24 based on his examination and testing to the median or ulnar
25 nerves.

1 Q. All right. And would you please explain to the jury
2 what Dr. Krusz reports in his report?

3 A. Well, to get down to the conclusion, he suggests
4 some kind of -- he calls it axonal neuropathy which is kind
5 of -- to put it in more simple terms is some kind of damage
6 to the median nerve. Axons are nerve cells. And a
7 neuropathy is some kind of disorder. And he also stated that
8 he felt that the ulnar nerve sensory conduction or the nerve
9 that supplies this part of the hand, mainly the small finger
10 and half of the ring finger, he stated the amplitude was
11 low. And when I say amplitude, they have an machine, almost
12 like an oscilloscope that an electrician uses that makes
13 little waves. And that reflects nerve activity. And so the
14 nerve -- certain nerves will have certain amplitude meaning
15 how big the spike is on the screen. And so if he's stating
16 that it was low, it means it's slightly lower than the
17 average height of the spike on the screen or on the sheet
18 that he reads which may be -- may have implication as to how
19 the nerve is functioning.

20 Q. Doctor, further on the first page of Defendant's 10
21 at the very bottom of that page, he states in his neurologic
22 examination, sensory: "There is a loss of sensation to
23 pinprick, light touch and temperature on the ventral side of
24 all four digits, the left side and on the side of the thumb
25 opposing the second digit."

1 What does that mean?

2 A. That would be -- the ventral side is the palm side
3 of the fingers, so he's talking about the four fingers and
4 he's talking about that area we were discussing yesterday on
5 this side of the thumb opposing the index finger. The dorsal
6 part of the hand would be the back.

7 Q. If you were to -- if you were treating Mr. Murphy
8 and if you were to receive this report from Dr. Krusz, what
9 would be -- Dr. Krusz just did an evaluation. There is
10 nothing in here about treatment. What kind of treatment
11 would you give Mr. Murphy?

12 A. Well, I'm not real clear on what kind of treatment I
13 could give Mr. Murphy. Basically the report states that
14 there are -- he feels there are some disorders, some slowing
15 of the velocity in the ulnar sensory pattern and in the
16 median sensory pattern. I felt when I read his raw data or
17 his numbers that he obtained, these numbers here which are
18 kind of -- what I was talking about before, with the spikes
19 and then the speed, the speed to which an impulse on a nerve
20 will travel through the hand, there was some abnormality, but
21 the numbers show it as not to be particularly severe. And
22 also -- and it might be just a limitation of how he was
23 supposed to carry this out. It doesn't really say at what
24 level necessarily the disorder is located.

25 Q. What do you mean level the disorder is located?

1 A. Well, for instance, if you're testing somebody for
2 carpal which is a peripheral nerve disorder, sort of what
3 we're talking about, they'll test at several levels. They'll
4 go from the arm to the forearm, to the wrist, to the hand.
5 And usually you'll see a slowing or some kind of effect at
6 the carpal tunnel and sort of proves that that's where the
7 nerve problem is.

8 On his testing it shows some abnormalities in the
9 hand, but it didn't really suggest where exactly the -- and
10 this isn't an exact science, but it didn't -- didn't really
11 give a good idea of where that problem was, so to speak.

12 Q. Is there any other conclusions you've come to after
13 reading this report?

14 A. Well, based on my interpretation of this report,
15 it's kind of confusing in the sense that the numbers don't
16 seem to show a real severe change in sensation, or as
17 evidenced by these numbers which are an objective finding, it
18 doesn't show something like complete numbness. It doesn't
19 show that there's no nerve impulses going through. They're
20 going through. There are slight changes which you can say
21 are abnormal. However, they do not show that there's a
22 complete block of the nerve. And it's not clear why this has
23 occurred to the nerve.

24 Q. When you compare Dr. Krusz' report to Dr. Garrison's
25 report, as an orthopaedic specialist, do you see an

1 improvement, a degeneration? What does a comparison between
2 the two reports tell you?

3 A. Well, there's obviously a difference between them.
4 I cannot say why there's a difference. I cannot say for sure
5 there was a degeneration or a change based on something
6 physiological. All I can say is there's a difference between
7 the two reports.

8 Q. Where is that difference, sir?

9 A. The difference is in the ulnar nerve and median
10 nerve. Dr. Garrison felt these nerves, the sensory and the
11 motor on those nerves was normal. Dr. Krusz believes there
12 are some abnormalities, as I stated before.

13 Q. Were there any other differences between the two
14 reports that you can see?

15 A. Well, the two -- the two studies were done in
16 slightly different manners, so it's difficult to really
17 compare them on the details, but on the overall impression at
18 the end, Dr. Garrison, as I said, did not feel there was any
19 objective abnormalities in the median and ulnar nerves where
20 Dr. Krusz did find some abnormalities.

21 Q. All right. Was there any differences in the
22 conclusions between Dr. Garrison and Krusz regarding the
23 medial nerve?

24 A. The median nerve?

25 Q. The median nerve?

1 A. Yes, there was.

2 Q. What were those, sir?

3 A. Okay. Dr. Garrison, based on his motor or the
4 nerve's ability to move muscles in the sensory which is what
5 makes you feel, he felt they were normal. Dr. Krusz felt
6 that there was some abnormality in the median nerve, both in
7 the motor side and in the sensory side, and also some
8 abnormality in the ulnar sensory, which it states in its
9 conclusion the ulnar sensory was slightly -- or the median
10 sensory velocity, sorry, was slightly slowed. So like I
11 said, he is stating there are abnormalities. However, they
12 are, according to his numbers, very slight abnormalities.

13 Q. Do you see any other differences between the two
14 reports of a substantive medical nature?

15 A. No, I do not.

16 Q. Finally, one more question. What about the
17 differences in the radial nerve?

18 A. Dr. Krusz did not test the radial nerve, as far as I
19 can see on this report.

20 MR. BYCK: Thank you, sir. Pass the witness.

21 Cross-Examination

22 By Mr. Davis:

23 Q. Dr. Vandiver, you first had an opportunity to look
24 at Dr. Krusz' report this morning; is that correct?

25 A. Yes, sir.

1 Q. At the time that it was provided to the State; is
2 that right?

3 A. Yes, sir.

4 Q. First, I want to talk to you about the timing of
5 these two tests. The test performed by Dr. Garrison was done
6 on September the 7th of 2000; is that correct?

7 A. Yes, sir.

8 Q. So that's going to be shortly -- that's going to be
9 less than one month before the murder of Bertie Cunningham on
10 October the 4th, 2000, right?

11 A. Yes, sir.

12 Q. The test done by Dr. Krusz is actually this year,
13 June the 1st, 2001, right?

14 A. Yes, sir.

15 Q. Obviously at the time that the examination was
16 performed by Dr. Krusz, this defendant was under indictment
17 and stood charged with the offense of capital murder,
18 correct?

19 A. Yes, sir.

20 Q. Mr. Byck asked you to talk about the neurologic
21 examination, and he specifically asked you about the sensory
22 portion where it says there is loss of sensation to pinprick,
23 light touch, and temperature on the ventral side of all four
24 digits, left side and on the side of the thumb opposing the
25 second digit.

1 First of all, let's talk about what sort of
2 examination that is, the sensory examination. Is that
3 something that's based upon some objective scientific test
4 being performed on Mr. Murphy, or is that in response to what
5 he's telling Dr. Krusz out there in his office?

6 A. Yes. The examination -- first of all, the pinprick,
7 light touch, and temperature just what they mean. They'll
8 take something cold, maybe something warm, touch it on the
9 skin and see if the patient knows that it's warm or cold.
10 The pinprick is just what it sounds like, kind of lightly
11 poking your skin to see if you respond, if you can feel it.
12 And then light touch is just what I'm doing here. So, yes,
13 that -- the outcome of that testing is based on what the
14 patient tells the examiner.

15 Q. Okay. So if I go in -- if I go in to a doctor such
16 as Dr. Krusz and he performs the pinprick and he sticks -- he
17 places a pin -- when the doctors do the pinprick, are they
18 actually breaking the skin?

19 A. No, they're not.

20 Q. So if he takes a pin and he touches me on the
21 fingers here and I say I can't feel that, Dr. Krusz, what is
22 the sensory examination going to state in my report?

23 A. Well, it will state just like he said, the patient
24 did not -- did not voice a response to that stimulus.

25 Q. And if he does the light touch as you've

1 demonstrated and I say I don't feel anything, I can't feel
2 that, Dr. Krusz, is he going to say there's a loss of
3 sensation to light touch, also?

4 A. Yes, sir.

5 Q. And if he put something hot on my fingers or
6 something cold, and I say I don't know what you put on my
7 fingers, I can't feel the difference at all, is he going to
8 say there's a loss of sensation to temperature?

9 A. Yes, sir, he is.

10 Q. So that is -- that is going totally going to be
11 dependent on the truth and veracity, I suppose, of the
12 subject or the patient; is that right?

13 A. Yes, sir.

14 Q. I guess as a doctor when you perform an examination
15 again, you depend upon the patient to tell you the truth to
16 some extent, don't you?

17 A. Yes, sir.

18 Q. Now, did you get a chance to look at the history
19 that Jedidiah Isaac Murphy, the defendant in this case, gave
20 to Dr. Krusz about the 1996 injury to his left hand?

21 A. Yes, sir, I did.

22 Q. And I'm referring now to the statement in this
23 report that says he sustained a gunshot wound to his left
24 palm in 1996, when a .22 caliber handgun discharged and the
25 bullet fragments were removed from the dorsum of the hand?

1 A. Correct.

2 Q. Is that an accurate history that was provided to Dr.
3 Krusz, or was that inaccurate?

4 A. There are differences between the history that was
5 provided to Dr. Krusz and Dr. DeHaan's assessment based on
6 his operative report and his physical examination at the time
7 of the injury.

8 Q. In fact, it wasn't a .22 caliber handgun, was it?

9 A. The history on the medical record that I looked at
10 from the time of the injury stated that it was a pellet.

11 Q. Uh-huh.

12 A. That was the word used.

13 Q. When Mr. Murphy stated that bullet fragments were
14 removed from the dorsum of the hand, there weren't any bullet
15 fragments, were there?

16 A. There was one single fragment, according to Dr.
17 DeHaan's operative report.

18 Q. So this history that was given to Dr. Krusz by the
19 defendant, Jedidiah Isaac Murphy, was not correct, was it?

20 A. It's not consistent with Dr. DeHaan's assessment,
21 no.

22 Q. It's not consistent with any of the prior medical
23 records of Jedidiah Isaac Murphy that we've looked at, is it?

24 A. No, it is not.

25 Q. So when Dr. Krusz took that history, I suppose again

1 it would be fair to say that a doctor in his position, when
2 he's given that history, I guess he has to assume again that
3 the patient is being truthful with him, doesn't he?

4 A. Yes, he does.

5 Q. Also, is there a notation on this report concerning
6 past medical history?

7 A. Yes, there is.

8 Q. Now again, I want you to assume for me that Dr.
9 Krusz is getting that information from the defendant, from
10 Jedidiah Isaac Murphy. What's the notation on Dr. Krusz'
11 report concerning past medical history?

12 A. States unremarkable.

13 Q. Unremarkable?

14 A. Yes.

15 Q. Is there also a notation for headache history?

16 A. Yes, there is.

17 Q. Would you assume again that this history is being
18 obtained from the defendant?

19 A. Correct.

20 Q. What's the notation of what Mr. Murphy told Dr.
21 Krusz?

22 A. States there is none, no headache history.

23 Q. Is there also a notation for pain history?

24 A. Yes.

25 Q. What's the notation there?

1 A. States none.

2 Q. Medications. What response is on that report?

3 A. Once again, none.

4 Q. None?

5 A. Yes, sir.

6 Q. I want to go back for just a moment on this sensory
7 examination. When we talk about a loss of sensation to the
8 ventral side of all four digits, what side of the fingers are
9 we talking about, Dr. Vandiver?

10 A. Talking about the palm side.

11 Q. All right. And we're also talking about the side of
12 the thumb opposing the second digit again, would that be the
13 palm side of the thumb?

14 A. That could be some of the palm side and some of
15 this, what you would call the side of the thumb, correct.

16 Q. Now, the median nerve, does it -- does it innervate
17 the ventral side of any of -- any of the four fingers here?

18 A. Yes, it innervates this -- the index finger, the
19 middle finger, half of the ring -- this half of the ring
20 finger, and the rest is a different nerve.

21 Q. Okay. And the rest -- the second half of the fourth
22 finger and the fifth finger are in the control of what nerve?

23 A. The ulnar nerve.

24 Q. So we're talking about the median nerve having the
25 first -- what I'm going to refer to as the second, the third,

1 and then a portion of the fourth; is that right?

2 A. Correct.

3 Q. On the ventral side?

4 A. Yes, sir.

5 Q. Does it also innervate the back side of any of these
6 fingers?

7 A. Yes, sir, it innervates to about the knuckle here.
8 It innervates the back of the index, middle, and half of the
9 ring finger.

10 Q. Doctor, did you see anything in this report that
11 indicated any loss of sensation to the back portion of these
12 fingers that the median nerve controls?

13 A. No, that was not noted on the examination.

14 Q. Do you find that unusual?

15 A. Well, if you're testing a nerve damage and you want
16 to try to isolate where the nerve damage might be, it would
17 probably be prudent to test all of the entire distribution of
18 the nerves, especially a sensory nerve.

19 Q. Okay. Why is what?

20 A. Because that could give you an idea of where the --
21 the pathology is located, where the nerve might be damaged,
22 if there is going to be a treatment for it.

23 Q. Uh-huh. And as I understand, again, the history
24 that -- or the responses given by Mr. Murphy to Dr. Krusz
25 makes absolutely no mention, does it, of having a loss of

1 sensation to the back side of the fingers that are controlled
2 by the median nerve, does it?

3 A. No, it does not.

4 Q. You -- you indicated that again the findings with
5 regard to the median nerve in Dr. Krusz' report, the left
6 median motor amplitude was low suggesting axonal neuropathy
7 in this trunk. Again, could you just explain what is Dr.
8 Krusz saying there first?

9 A. Let me just review that.

10 He's suggesting that the spike for what I was
11 talking about before, about amplitude, the height of the
12 spike was low indicating that there was evidence of some kind
13 of disorder within the nerve, based on his -- on his testing.

14 Q. Tell us, if you will, again, just the basic
15 distinction between median motor and median sensory.

16 A. The nerve has two functions, so to speak. There's
17 some muscles in the hand. Basically the hands -- the muscles
18 that oppose the thumb are controlled by the median nerve.
19 The median nerve also has a sensory function which is what we
20 discussed. And right as the median nerve comes through the
21 carpal tunnel, right as it comes out of the carpal tunnel, it
22 splits into several branches, some of which are sensory, some
23 of which are motor.

24 Q. Doctor, when we talk about the test results for the
25 median motor across the wrist here, okay, looking at the

1 numbers generated by Dr. Krusz, what sort of conclusions did
2 you reach concerning the median motor function?

3 A. Except for the amplitude which is slightly
4 decreased, the other numbers, including conduction velocity,
5 which is how fast the impulses travel from one end of the
6 nerve to the other, and one can safely assume that if there
7 is significant damage to the nerve, that the conduction
8 velocity, such as in a carpal tunnel test, will be slowed
9 down to some extent. That is not the case on the conduction
10 velocity of the median motor across the wrist which is going
11 in the hand. And also the distal latency which is the speed
12 of which the nerve then affects the muscle or makes it do its
13 action is also not slowed down.

14 Q. Is there anything in this test to suggest that Mr.
15 Murphy would have any difficulty actually making a fist or
16 actually being able to grab an object, such as the handle of
17 a gun and control it with the motors -- with the motor skills
18 or the muscles in his left arm or his left hand? Anything to
19 suggest that he would have any problem doing that?

20 A. No, not based on my interpretation of this report.

21 Q. Now, the median sensory is the other function for
22 the nerve, correct?

23 A. Yes, sir.

24 Q. And looking again at the tests that were run by Dr.
25 Krusz, the median sensory, the forearm, the left side, under

1 the category of amplitude, is that WV or UV?

2 A. Yes, it's -- I think it's -- I'm not sure what those
3 letters stand for. It has to do with the -- with how the
4 wave looks.

5 Q. Okay. And Dr. Krusz' notation for that category,
6 median sensory amplitude, what did he say on his report?

7 A. He said it was normal.

8 Q. Normal?

9 A. Yes, sir.

10 Q. Which would indicate to you what?

11 A. Which would indicate that the median sensory going
12 into the forearm and then coming up to the wrist was normal.

13 Q. Uh-huh.

14 A. There was no abnormality at that point.

15 Q. Okay. The next category being conduction velocity
16 meters per second. Now, his finding -- as I understand, he
17 came up with a number of 49.4, correct?

18 A. Yes.

19 Q. What would be expected to be the normal value for
20 that particular category?

21 A. Greater than 51 meters per second.

22 Q. Greater than 51?

23 A. Based on Ms. -- based on Dr. Krusz' form which shows
24 his normal values to the right, greater than 51 meters per
25 second would be the correct conduction velocity.

1 Q. So we're talking about a shortfall of what, 1.6
2 meters per second?

3 A. Correct.

4 Q. From the expected normal value, correct?

5 A. Correct.

6 Q. Does that figure out to roughly a 3 percent
7 deviation from the expected value?

8 A. Yes, it is.

9 Q. And finally, the category median sensory, the distal
10 latency. Tell us what that particular category is looking
11 at.

12 A. It's looking at where the nerve reacts or there's
13 reaction in the nerve at the end wherever -- distal latency
14 means the end. It could be in the wrist, but if you're
15 stimulating it up here, the distal latency would mean at the
16 end of where you're testing it, so it doesn't have to be the
17 tips of the fingers. That means where you get a response
18 to -- you get a response to the electrode or whatever you are
19 using to see if that nerve has been stimulated. And as soon
20 as that response occurs, then the time between the time you
21 stimulate it and the time you feel that response is where you
22 get the conduction velocity from.

23 Q. Dr. Krusz came up with a value of 2.7 in that
24 category, right?

25 A. Correct.

1 Q. What would the expected normal value be for that?

2 A. Less than 3.8.

3 Q. Well, certainly 2.7 then would fall well within the
4 expected values there, wouldn't it?

5 A. Yes, sir, it would.

6 Q. So for median sensory the test results showed for
7 amplitude normal -- or distal latency, it was normal and when
8 it came down to conduction velocity, we're talking about a
9 deviation of approximately 3 percent from expected normal
10 values, correct?

11 A. Correct.

12 Q. When we go down there to the ulnar motor findings,
13 amplitude, Dr. Krusz found that to be normal, didn't he?

14 A. Yes, he did.

15 Q. Came down to conduction velocity, he found that to
16 be normal, didn't he?

17 A. Correct.

18 Q. And the final category of distal latency, that was
19 also normal, wasn't it?

20 A. Yes, it was.

21 Q. So when it came down to ulnar motor function, there
22 was nothing abnormal at all, was there?

23 A. No, not according to this report.

24 Q. And the only abnormality that he noted with the
25 ulnar was to the sensory where he's put down amplitude being

1 low?

2 A. Correct.

3 Q. Can you -- does that say anything to you
4 particularly? Would you expect -- how do you -- how do you
5 interpret that when someone just says low?

6 A. Well, it means they -- they don't see it the way it
7 should appear on that screen or on that readout, but one
8 thing that can happen with that is that you can have
9 inadvertent stimulus of another nerve that's close by whose
10 amplitude would be low if it was, you know, sort of labeled
11 as ulnar, but would be normal if it was labeled, say,
12 median. So there is -- there is a possibility that either
13 that is an abnormal finding or it's based on stimulation of
14 a -- of an adjacent nerve.

15 Q. Uh-huh. The conduction velocity, the values
16 there -- the normal would have been expected to be at greater
17 than 52 and he found 41.2?

18 A. Yes, he did.

19 Q. And then distal latency, that was normal also,
20 wasn't it?

21 A. Yes, it was.

22 Q. So you're assuming these numbers are correct then.
23 What is your conclusion that you draw from the numbers when
24 we're talking about the ulnar sensory that -- what -- it
25 would again control the second half of the fourth and the

1 fifth finger, correct?

2 A. Yes. Based on his assessment, if we're assuming it
3 is the ulnar nerve indeed that was stimulated, then there is
4 a slowing of the conduction indicating some kind of
5 abnormality in the ulnar nerve.

6 Q. When we talk about these averages or expected
7 numbers, you know, when we talk about, for instance, on the
8 ulnar sensory, the conduction velocity being -- the normal
9 being greater than 52, does every human being, including
10 every one in this courtroom, if we tested, are we all going
11 to be 52 if we're normal?

12 A. Not necessarily. These are numbers based on
13 averages. There's a possibility that somebody could fall
14 below what's, quote, called normal and yet not have any
15 symptoms.

16 Q. Okay. So just because -- let's say if someone came
17 in there and tested out at a 47 or a, does that necessarily
18 mean that they're going to have some sort of problem with
19 their ulnar nerve sensation?

20 A. No. I couldn't say that for sure, no.

21 Q. In order to make that kind of determination, let's
22 say -- and we're dealing with a supposed problem in the left
23 extremity here, what would you as a physician expect from
24 someone who is conducting these sorts of studies to do in
25 that regard? Knowing that the average may not be the average

1 for every single individual, what would you prefer to see
2 done instead of just testing the left extremity?

3 A. I would to -- if you have any doubt as to the
4 numbers, then the best thing to do would be to test the
5 contra lateral side, assuming it is not -- there are no
6 symptoms, there are no other damage that's known. If you --
7 if you test the contra lateral side, then you would have a
8 better idea of what's, quote, normal for that individual.

9 Q. In this particular case would you have preferred for
10 Dr. Krusz to have tested the right side, the right extremity,
11 the right arm of the defendant?

12 A. In order to remove any doubt as to the veracity of
13 the numbers, that, in my opinion, would have been a good
14 idea.

15 Q. Do you think that would have been helpful to
16 determine whether or not, for instance, when we're talking
17 about median sensory, to determine whether or not 49.4
18 instead of 51 is actually the average that you would expect
19 to see in Jedidiah Isaac Murphy?

20 A. Correct.

21 Q. Same be true I suppose when we're talking about the
22 ulnar sensory readings. Would it have been helpful and
23 useful for you as a doctor to have the numbers run on the
24 right arm with regards to the ulnar nerve to see if that's
25 abnormal for him or whether it falls within the normal

1 category for Jedidiah Isaac Murphy?

2 A. Yes, that would have been helpful.

3 Q. That was not done, was it?

4 A. No, sir, it was not.

5 Q. Finally, Doctor, I want to -- I want to go down to
6 the final portion of this report, central responses. What
7 does central responses mean to you as a doctor?

8 A. Central responses have more to do with the -- the
9 overall function of the nerve, such as where it comes out of
10 the -- out of the cervical spine, comes down around the front
11 of the shoulder, and goes all the way down, all the way to
12 the end where it's function is. So it has more to do with
13 the overall functioning of the nerve, not necessarily where
14 the nerve might be malfunctioning at one certain point.

15 Q. Uh-huh. If it is malfunctioning?

16 A. Correct.

17 Q. I want to read this statement to you, and I want you
18 to tell me whether you agree or disagree with this based upon
19 the numbers provided to us by Dr. Krusz. Says: "Left median
20 H reflex and F wave is markedly prolonged; this is also true
21 for the ulnar nerve. This suggests profound neuropathy in
22 both nerve trunks."

23 A. Correct.

24 Q. Do you agree with that statement?

25 A. Well, his numbers, according to how he tested,

1 obviously he found that they were prolonged. However, when
2 he uses the word "trunks," I'm not sure if he's referring --
3 if you see a picture of the nerve, something called the
4 brachial plexus which is where the nerves all come out of the
5 side of your neck and they all kind of crisscross around and
6 they -- when they come out of your neck, they're not called
7 ulnar and regular nerves. The nerve roots, they have numbers
8 just like your vertebrae have numbers. And they kind of
9 crisscross, and then they come out at the end as the three
10 main nerves and also a couple of additional nerves that you
11 have in your upper arm. So it's hard to tell whether he's
12 talking about the motor distribution or the sensory
13 distribution, what that means.

14 Now, I can tell you that on his form here, when he's
15 talking central responses, he's testing a muscle. So it
16 could be that the abnormal response may have to do with --
17 with the muscle and not with the -- or the motor part of it
18 and not with the sensory part of it.

19 Another possibility is that when he uses the word
20 "trunk," there is a certain portion of that nerve plexus
21 where the nerves are called trunks. And also you can say the
22 main nerve coming down the arm is a trunk because it's a main
23 like a cable. So it's not clear if he's talking about an
24 abnormality showing up here or an abnormality anywhere along
25 the nerve itself before it branches out.

1 Q. Do you agree with the characterization of neuropathy
2 being profound based on the numbers that you have before you?

3 A. No, I do not.

4 Q. So that I'm -- so that I'm clear here, did I
5 understand you to testify earlier that the numbers do not
6 show a complete numbness in the fingers of Jedidiah Murphy?

7 A. No, based on this report there is a -- there is a
8 response in the fingers that would indicate that there are
9 impulses getting through. I do not believe that one could
10 determine that there is complete loss of sensation based on
11 this test.

12 Q. Thank you, Dr. Vandiver.

13 MR. BYCK: Nothing further.

14 THE COURT: Thank you, Doctor. You again may
15 be excused.

16 Consistent with prior representation by counsel --

17 MR. BYCK: Yes, Your Honor.

18 THE COURT: Mr. Byck.

19 MR. BYCK: Yes, Your Honor.

20 THE COURT: Ladies and gentlemen, we'll stand
21 in recess until tomorrow morning. You -- we're going to be
22 here before you are, but you need not be here until 9:15
23 tomorrow morning. Let me give you a bit of an indication of
24 where we are just for your own life away from the Crowley
25 Courts Building.

1 We anticipate finishing all of the testimony
2 tomorrow before noon. I have put both sides on alert that if
3 there is anticipated rebuttal evidence, to have those
4 witnesses available awaiting their opportunity to come right
5 into the courtroom so there will not be hopefully any delays.
6 Hope to conclude all of the testimony in the trial by noon.
7 Therefore you will be free to go about your own personal or
8 business life from noon onward until Monday morning. We are
9 going to stay tomorrow afternoon and work on the Court's
10 charge, the instructions that I by law am required to give to
11 you before the attorneys make their summations or final
12 arguments, if you will, and before you begin your
13 deliberations. So you'll have the entire weekend without
14 having to worry anymore about this than you normally would.

15 When you return Monday morning, it is anticipated
16 that charge will be prepared, ready for you to come out into
17 the courtroom. I will read it to you. The attorneys will
18 make their summations. You will then be given an opportunity
19 to deliberate. So hopefully that gives you a bit of an idea
20 of what you can anticipate tomorrow and the first part of
21 next week.

22 Have a good evening. See you tomorrow morning, 9:15
23 a.m.

24 THE BAILIFF: All rise.

25 (Jury excused from courtroom.)

Reporter's Certificate

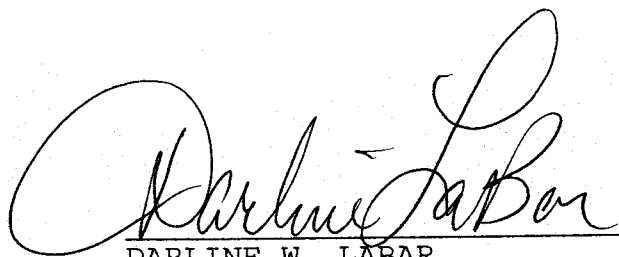
STATE OF TEXAS:

COUNTY OF DALLAS:

I, Darline W. LaBar, Official Court Reporter of the 194th Judicial District Court, in and for Dallas County, Texas do hereby certify that the foregoing volume constitutes a true, complete and correct transcript of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in the statement of facts, in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

Witness my hand this the 28th day of October, A.D., 2001.



DARLINE W. LABAR
Official Court Reporter
194th Judicial District Court
Dallas County, Texas
(214) 653-5803

Certification No. 1064 Expires December 31, 2002

REPORTER'S RECORD

74145

VOLUME 51 of 65 VOLUMES

TRIAL COURT CAUSE NO. F00-02424-NM

THE STATE OF TEXAS : IN THE DISTRICT COURT
VS. : DALLAS COUNTY, TEXAS
JEDIDIAH ISAAC MURPHY : 194TH JUDICIAL DISTRICT

TRIAL ON THE MERITS BY JURY

FILED IN
COURT OF CRIMINAL APPEALS

DEC 5 2001

Troy C. Bennett, Jr., Clerk

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Phone: 214-653-9400
FOR THE DEFENDANT.

On the 8th day of June, 2001, the following
proceedings came on to be heard in the above-entitled and
numbered cause before the Honorable F. Harold Entz, Jr.,
Judge presiding, held in Dallas, Dallas County, Texas:

Proceedings reported by machine shorthand, computer
assisted transcription.

DARLINE W. LABAR, OFFICIAL REPORTER

ORIGINAL

1
2
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6
7
8
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10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX VOLUME 51

	PAGE	VOL.
June 8th, 2001		
Proceedings.....	2	51
Defense Rests.....	38	51
Both Sides Close.....	38	51
Reporter's Certificate.....	51	51

CHRONOLOGICAL WITNESS INDEX

	DIRECT	CROSS	VD	VOL.
DR. JOHN KRUSZ	2			51
DR. JOHN KRUSZ	7, 37	24		51
JEDIDIAH ISAAC MURPHY	39			51
RAY LaPERE	41, 45	44		51

ALPHABETICAL WITNESS INDEX

	DIRECT	CROSS	VD	VOL.
DR. JOHN KRUSZ	2			51
DR. JOHN KRUSZ	7, 37	24		51
RAY LaPERE	41, 45	44		51
JEDIDIAH ISAAC MURPHY	39			51

No Exhibits Admitted This Volume

P R O C E E D I N G S

THE COURT: Let the record reflect this hearing is being conducted in open court, outside the presence and hearing of the impaneled juror and the one alternate. The accused, Jedidiah Isaac Murphy, will be present in court at all times during this hearing. The hearing is occasioned by Texas Rules of Evidence Rule 705.

Is the State prepared to proceed with the 705 hearing with Dr. Krusz?

MR. DAVIS: The State's ready, Your Honor.

THE COURT: Is the defense prepared to proceed?

MR. BYCK: Yes, Your Honor.

THE COURT: Good morning, Doctor. May I ask you to raise your right hand.

(Witness sworn.)

THE COURT: Thank you very much. You may lower your hand, sir.

Counsel may proceed.

MR. DAVIS: Thank you, sir.

DR. JOHN KRUSZ

was called as a witness by the State and, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Davis:

1 Q. Would you please state your full name for the
2 record?

3 A. John Claude Krusz.

4 Q. You're a medical doctor; is that correct?

5 A. Yes, sir.

6 Q. Dr. Krusz, the purpose of this hearing is simply to
7 have you elicit for me what opinions that you intend to
8 express to this jury. Would you please tell me what expert
9 opinions you do intend to talk to this jury about?

10 A. To address findings relating to nerve conduction
11 velocity studies and a neurologic exam I performed on Mr.
12 Murphy.

13 Q. So as I understand then, your opinion will be
14 limited to whatever opinions generally are found in your
15 report that's entitled "Initial Neurologic Evaluation"; is
16 that correct?

17 A. Yes, and the implications thereof.

18 Q. Okay. And can you tell me what implications thereof
19 that you intend to express, because I've had the opportunity
20 to read your report. What -- what conclusions will you be
21 expressing as a result of your evaluation?

22 A. I don't have my report in front of me, so if I could
23 possibly see that.

24 THE COURT: Absolutely.

25 (Exhibit handed to doctor.)

1 A. My impression obviously is limited to the sense --
2 motor and sensory findings as above relating back to the
3 neurologic examination. And then of course there's separate
4 data relative to testing individual nerve trunks so that
5 would be primarily the data that I would speak to.

6 Q. (By Mr. Davis) Okay. So as I understand, you're
7 basically going to explain the data that you obtained during
8 the test --

9 A. Yes, sir.

10 Q. -- is the correct? You'll explain what that means.

11 A. Yes, sir.

12 Q. And then I take it that you will be talking in some
13 greater detail about whatever conclusions that you drew from
14 the data?

15 A. Yes.

16 Q. All right. Your report states that you -- that you
17 found profound neuropathy in both nerve trunks; is that
18 correct? They're the findings --

19 A. One portion of it does say that, yes.

20 Q. All right. Specifically what -- what opinions do
21 you intend to offer concerning Mr. Murphy's loss of sensation
22 in his four fingers? What -- just in general can you tell me
23 what your testimony will be in that regard?

24 A. Well, in general my testimony will relate to his
25 lack of ability to feel certain kinds of sensations in his

1 left land but not his right, various aspects of various
2 digits. And I believe you asked me specifically about
3 sensation?

4 Q. Yes, sir. How about the motor function of his left
5 hand?

6 A. Testimony will speak to various diminished capacity
7 to have motor strength, again, in various digits of his left
8 hand.

9 Q. Okay. In reaching those opinions, can you tell me
10 what documents, if any, that you relied upon? Were you
11 provided with any documents in this case?

12 A. No, I was not.

13 Q. Specifically have you been provided with any of the
14 medical records of Mr. Murphy?

15 A. I have not.

16 Q. Were you provided with any sort of police reports to
17 review?

18 A. No, I have not.

19 Q. Were you provided with any photographs in this case
20 to review?

21 A. No, I have not.

22 MR. DAVIS: That's all I have, Judge.

23 THE COURT: Mr. Byck.

24 MR. BYCK: One thing, Your Honor. Dr. Krusz
25 has a curriculum vita that evidently is somewhere in his

1 computer. We would offer that CV for record purposes only,
2 and we would ask the indulgence of the Court and the District
3 Attorneys Office. If Dr. Krusz could download it, either
4 into a computer, at some time other than this. Is there
5 any --

6 MR. DAVIS: I don't have any objection to
7 that.

8 THE COURT: Defense request is granted by the
9 Court.

10 MR. BYCK: Thank you. We're ready for the
11 jury.

12 And, Your Honor, Dr. Krusz is on call at
13 Presbyterian Hospital. If he is paged, we're just going to
14 have to terminate our interview at that time.

15 THE BAILIFF: All rise.

16 THE COURT: Let the record reflect the jury is
17 returning to the courtroom at this time.

18 (Jury returned to courtroom.)

19 THE COURT: Ladies and gentlemen, you may be
20 seated.

21 Mr. Murphy, counsel, visitors in the gallery, you
22 may be seated.

23 Ladies and gentlemen, there was a hearing outside of
24 your presence before coming into the courtroom. This witness
25 has been sworn in. He is under oath.

1 Defense may proceed.

2 MR. BYCK: Thank you, Your Honor. May it
3 please the Court.

4 DR. JOHN KRUSZ
5 was called as a witness by the Defendant and, after having
6 been first duly sworn, testified as follows:

7 Direct Examination

8 By Mr. Byck:

9 Q. Sir, would you give your name and spell your last
10 name for the court reporter?

11 A. John Claude Krusz, K-r-u-s-z.

12 Q. And you are a medical doctor?

13 A. Yes, sir.

14 Q. Dr. Krusz, could you give us a brief description of
15 your educational background, employment, and experiences that
16 qualify you to hold both your -- you're a psychiatrist as
17 well as a medical doctor; is that correct?

18 A. No, I'm trained as a neurologist, trained as a
19 physician with specialty training in neurology. I have
20 boards in neurology and psychiatry.

21 Q. You are board certified in psychiatry.

22 A. In neurology and psychiatry.

23 Q. In neurology and psychiatry.

24 A. Yes.

25 Q. Separate boards?

1 A. No, it's a common board.

2 Q. It's a common board.

3 A. Yes.

4 Q. And where did you go to school, sir? What is your
5 educational background?

6 A. I have an undergraduate degree in pharmacy and a
7 graduate degree in neuropharmacology.

8 Q. From where?

9 A. Down State Medical Center in New York. I have a
10 medical degree from university -- State University of New
11 York in Buffalo, and then residency training at Baylor and
12 back in Down State Medical Center in neurology.

13 Q. How long have you been practicing medicine?

14 A. In Dallas, since 1987.

15 Q. And before that?

16 A. Well, I was doing my residency training.

17 Q. I see. And, Dr. Krusz, how are you currently
18 employed?

19 A. I'm in private practice.

20 Q. And are you the consulting neurologist for
21 Presbyterian Hospital?

22 A. I'm just one of the attending doctors there.

23 Q. But you are on call this particular month, aren't
24 you?

25 A. Yes.

1 Q. Okay. Doctor, on June the 1st of this year, did you
2 have an occasion to conduct a neurologic evaluation of Mr.
3 Jim Murphy?

4 A. Yes, I did.

5 Q. And essentially what did that examination consist
6 of?

7 A. Well, the exam was essentially limited to his left
8 upper extremity in terms of obtaining some history of various
9 traumas that he had sustained to -- to that hand. We didn't
10 focus on general physical or neurological examination. My
11 understanding was the purpose was to specifically address
12 problems that he was experiencing with his left arm, left
13 hand.

14 Q. Now, concerning Mr. Murphy's medical history, did
15 you take a brief medical history from him?

16 A. Only that -- yes, I mean, in one sentence that he
17 had been in good health prior to -- other than sustaining the
18 traumas to his left hand.

19 Q. And what traumas did he tell you that he sustained?

20 A. Three. He had sustained a gunshot wound to his --
21 to the palm of his left hand, requiring surgical extraction
22 of bullet fragments through the -- to other side of his hand,
23 surgically. That was in 1996. He had also sustained a
24 second injury to his left thumb in June of 2000, such that he
25 had snapped his thumb backwards, was accident at work, and

1 that in turn required more surgical repair of the base of his
2 thumb joint. And he had sustained a third self-inflicted
3 wound to his -- well, to an area above his wrist about a
4 month ago.

5 Q. And, Doctor, if that -- if the gunshot wound was not
6 truly a gunshot wound but a pellet gun wound, would that make
7 any difference in the test and evaluation that you ran?

8 A. It could. Pellets typically will scatter, and since
9 the location of a pellet gun wound would -- you're in an area
10 where you have sort of a break up of two major nerve trunks
11 that supply your digits or fingers. Theoretically, scatter
12 from a pellet gun wound could affect more than one nerve
13 trunk per se.

14 Q. Did you see any independent physical corroboration
15 of Mr. Murphy's claims of prior injury? Scars? Surgical
16 incisions? Wounds? Anything like that?

17 A. Well, as I commented, he does have several
18 well-healed scars, partially healed scars in one case. But
19 as far as well-healed scars, he has a long -- we call it a
20 transverse scar across his mid palm, and he has a second scar
21 that's also well healed on what we call the dorsum of the
22 hand, the other side of the palm. Those are two well-healed
23 scars which are easily to be found.

24 Q. Now, you conducted a neurologic examination --

25 A. Yes.

1 Q. -- of his hand, and you did a sensory examination;
2 is that right?

3 A. That's correct.

4 Q. And what does that sensory examination consist?

5 A. Well, a sensory exam basically regardless of what
6 body part you're testing sensation, you can really only test
7 three or four major sensations, light touch, temperature,
8 sharp sensations, pin prick. In some cases one can test
9 whether a person can perceive the distance between two pin
10 pricks. In some cases one could test what we call
11 graphesthesia which is the drawing of a symbol or number or a
12 letter of the alphabet on the skin. Those are probably
13 really all the sensations you can really test on a person
14 regardless of what body part you test it on.

15 Q. All right. And you conducted these sensory tests on
16 Mr. Murphy's left hand; is that correct?

17 A. I did.

18 Q. And, Doctor, I -- I would imagine that you use a
19 needle to test the pressure or a hot -- something hot and
20 cold? You describe to me how you would test this.

21 A. Well, we can use hot and cold objects, and we often
22 use really a tuning fork that is aluminum so at room
23 temperature it stays cold. And for -- detecting changes in
24 how one perceives cold, it's usually quite sufficient, so we
25 did use that. Didn't use any hot -- any particular hot

1 object at all to test heat sensation. For pin prick, we
2 usually have a -- what we call a Wartenberg wheel. It's just
3 a rolling wheel with pins. It's sort of like a wheel with
4 many spokes and that can test sharp sensation.

5 Q. Now, if an individual wanted to fool you, Doctor,
6 for whatever reason, wanted you to think that there was a lot
7 less sensation or a lot less -- let's talk about sensation.
8 A lot less ability to perceive sensation in their hand, when
9 you conduct these tests, would an individual be able to fool
10 you?

11 A. Well, in some ways the sensory part of the exam is
12 sort of a -- one of the weaker links in the sense that you
13 are dependent on the feedback from the person that you're
14 testing. But in some ways we try to build in some fail-safes
15 in the sense that you could do some of the testing at a time
16 when you -- we sort of time portions of our testing to when a
17 person's got his eyes closed or blinking. And if you don't
18 get a reaction that you would expect -- for instance, if
19 somebody is being tested with a sharp object, they'll
20 typically withdraw a little bit. And if they don't withdraw
21 from a non-body part, you get a sense that they didn't really
22 appreciate the sharp sensation as much.

23 Q. Doctor, how many of these neurologic examinations
24 have you conducted on let's say, hands?

25 A. I guess thousands is probably just a rough number.

1 Q. And have you had occasion where individuals tried to
2 fool you, tried to make you think something?

3 A. Yes.

4 Q. Were you able to discover that?

5 A. At times, yes.

6 Q. All right. But you're not perfect. At other times
7 it's possible you could have been fooled?

8 A. Yes.

9 Q. All right. What were the results of the sensory
10 examination that you conducted on Mr. Murphy?

11 A. Well, the major findings were that below the scar
12 line, and really speaking from the base of the last -- the
13 four digits, not counting the thumb, there was a sharp drop
14 off in the ability to perceive light touch, temperature, pin
15 prick in all four digits primarily on this side of the hand,
16 less so on this side, again, compared to the right hand.

17 Q. All right. And for better or for worse we have all
18 become somewhat schooled in ventral and dorsal.

19 A. Right.

20 Q. Which side --

21 A. This is ventral. This is dorsal.

22 Q. All right. Did you detect through your experience
23 and through your observation any faking, any lack of
24 reporting, any lack of cooperation with Mr. Murphy as he gave
25 you his responses to your tests?

1 A. I did not.

2 Q. All right. You went further and conducted motor
3 tests; is that true?

4 A. Yes.

5 Q. And of what do they consist?

6 A. Well, a motor exam is testing the ability of muscles
7 to contract or the power that a muscle group can generate
8 based on voluntary effort. And so we primarily tested
9 various muscle groups in the left upper -- well, actually the
10 left and upper extremity. For one thing -- I'm sorry, I
11 don't know if I'm answering your question actually.

12 Q. That I would imagine would be the ability to grasp
13 an object?

14 A. To a certain extent.

15 Q. What other abilities?

16 A. Well, what we do is we try to look at individual
17 groups of muscles from the standpoint of -- of the use of a
18 limb let's say. It actually -- one begins a motor exam by
19 simple observation. So when he was brought to the office,
20 the first second I laid eyes on Mr. Murphy, you know, you
21 observe how he walks, how he holds his shoulders, how he uses
22 his arms. Obviously, he was handcuffed. Those had to be
23 removed for the exam. And so how he used his upper
24 extremities is the first part of a motor exam. During the
25 course of history gathering and so on, just the observation

1 of how somebody sits or holds their body in space is part of
2 a motor exam, even though it's by observation, not by
3 voluntary testing. And when we go on to do a more detailed
4 exam, as we did more in the lower regions, if you will, of
5 the outer areas of the hand, then we focus in on specific
6 muscle groups.

7 Q. What exactly did you do to test his -- would it be
8 motor strength --

9 A. Yes.

10 Q. -- is that what we're talking about --

11 A. Yes, we're talking --

12 Q. -- in his four digits and his thumb?

13 A. Yes.

14 Q. What did you have him do?

15 A. Well, we started actually more at the elbow, and his
16 strength as far as flexion and extension was normal, at least
17 equal right versus left, let's put it that way. And I would
18 call it normal. His strength at the wrist per se in terms of
19 again flexion and extension, this being flexion, this being
20 extension, this being flexion, was equal, so that there
21 wasn't any great disparity between the right hand and the
22 left hand. And then we started testing individual muscle
23 groups in different kinds of movements below the wrist
24 essentially. And so we tested his ability to grip with his
25 fingers which would be called flexion, his sort of proximal

1 flexion, distal flexion, very distal flexion. There's
2 extension of course. There are certain muscle groups that
3 are -- lie between the fingers that allow us to do this and
4 maintain it with force. And then there's a whole separate
5 set of muscle groups that allow our thumb to do various
6 functions, meaning abduction, adduction, apposition, and so
7 on. There's just a whole range of motor functions. And so
8 we tried to test as many aspects of those as we could do.

9 Q. All right. And, Doctor, again let me ask you if an
10 individual wanted to fake it, wanted to give you the
11 impression that he had less strength or less ability to flex,
12 less ability to -- whichever -- whichever way, would he be
13 able to do that? Would an individual be able to fool you
14 that way?

15 A. It's theoretically possible that somebody can give
16 you give you what we call giveaway weakness. In other words,
17 they can voluntarily give you less effort in an affected body
18 part in an attempt to make it look like there's less motor
19 strength. Sure, that certainly can occur.

20 Q. Did you observe anything like that?

21 A. No. From my exam, I'm reasonably certain that I
22 didn't detect any giveaway weakness per se, at all.

23 Q. All right. And then you conducted the nerve
24 conduction velocity test, right?

25 A. Yes.

1 Q. Now, that can't be faked, can it?

2 A. No, it's just a -- it's an independent measurement
3 of how nerve trunks send their signals.

4 Q. And that has nothing to do with report -- with the
5 individual's reporting; is that right?

6 A. That's right.

7 Q. And please explain to us the nerve conduction
8 velocity study that you did on Mr. Murphy.

9 A. Nerve conduction velocity studies have -- well,
10 there are sort of two major kinds. One you can test the
11 motor component of a nerve trunk, keeping in mind that a
12 nerve trunk is not one thing. It's a collection of different
13 size nerves, some of which are going from the spinal cord out
14 to muscles to make them work and some of which are bringing
15 information back. Those are called sensory nerves of which
16 there are eight or nine varieties. So a nerve trunk is a
17 mixed item, and so you can test the motor component, the
18 component that has to do with voluntary use of muscles, and
19 then you can test the sensory component of the nerve trunk.
20 So there are two separate -- and I think that's broken out in
21 my -- sort of work sheet, but those are the fundamental basic
22 things we test. The other things we at look are what segment
23 of the nerve trunk are you testing. So in this case -- for
24 one -- one -- let me back up.

25 There are two major nerve trunks we typically test

1 in the upper extremity. One is called a median nerve, which
2 typically runs down the center of the hand and goes through a
3 little tunnel. Most people know about carpal tunnels and
4 things like that. Well, that's the median nerve that runs
5 through a little bony tunnel. And typically has more to do
6 with the first three fingers for motor and sensation. And
7 then there is the ulnar nerve. When you bang your elbow on a
8 table, it's sort of a funny bone -- it's not a funny bone.
9 It's you're banging on the ulnar nerve trunk and sending off
10 sensations into the last two nerves -- the last two fingers.
11 And so that's kind of how the hand functions are split up.
12 Primarily there's a minor component from the radial nerve,
13 but we don't typically test that. So two nerve trunks,
14 median and ulnar, and then the question becomes what segment
15 of those nerve trunks can you reasonably test.

16 Well, the only reasonable test you can do for the
17 median nerve trunk is below the wrist crease and above the
18 wrist crease, and you can test higher, too, but for the
19 purposes of this exam it doesn't matter. So above and below
20 the wrist crease to the median nerve trunk and for the
21 purposes of the ulnar nerve trunk really just from the
22 segment from the wrist up to the elbow, and those were the
23 segments that we tested for those two nerve trunks, both
24 motor and sensory.

25 Q. Now, in testing those you -- you got a bunch of

1 numbers; is that right?

2 A. That's correct.

3 Q. And first of all, where do the normal values come
4 from?

5 A. Well, the norms have been developed over -- probably
6 since the late 30's or early 40's when nerve conduction
7 studies were initially founded, so to speak, or discovered.
8 And technology has been developing. But fundamentally most
9 of the data on normal is men, women, different age groups,
10 have been around since the mid 70's.

11 Q. And differences between normal -- the normal numbers
12 and the numbers that you got on Mr. Murphy don't appear to be
13 very large. There doesn't appear to be, you know, twenties
14 or thirties. It's sometimes just -- for example, on your
15 median motor nerve, your amplitude, normal is 17.5, looks
16 like less than 17.5?

17 A. A value greater than 17.5.

18 Q. Greater than 17.5. You know why I went to law
19 school.

20 The value that you got from Mr. Murphy is 14.6.
21 There's not a lot of difference between that, but are those
22 small differences significant?

23 A. Well, they can be. I mean, you have to plug
24 everything back into the entire equation. So looking at a --
25 one number doesn't tell you anything. It's like saying the

1 barometric pressure is 30.06, what does that mean relative to
2 what? That is maybe a bad example. But 14.6, you call
3 that -- it's sort of a mild axonal neuropathy. Axonal is
4 just one kind of neuropathy. These numbers give you a hint
5 of what kind of nerve trunk damage you're -- you may be
6 looking at. And so an amplitude means the size of a
7 response. So when you look at the size of the wave that you
8 generate and you measure it which is what we do -- and in
9 this particular case, you're talking about the forearm
10 meaning above -- above the wrist for the median nerve. The
11 amplitude is down some. It's 14.6 whereas you want it
12 greater than 17.5. So you call that a -- if you had to
13 categorize it, I guess you'd say it's a mild motor
14 neuropathy.

15 Q. But it's the compilation of all the numbers, and
16 it's not a additive function I take it. It's a calculus.

17 A. Well, you're looking -- yeah, it's -- you're sort of
18 looking at everything. I mean, conduction velocity counts.
19 The distal latencies, how long it takes a signal to traverse
20 from the stimulation point to the recording point. That
21 counts as well. And that's the purpose of the nerve
22 conduction study is to give us sort of objective data about
23 how a signal travels down a nerve trunk, or in the sensory
24 case up a nerve trunk.

25 Q. Doctor, would it be important in establishing -- I

1 don't know, in establishing what to measure the nerve
2 conduction of the other hand, of the right hand?

3 A. In the absence of any clinical symptoms relating to
4 that extremity, it's -- I suppose you could make a case for
5 doing it, but the expectations would be that the values would
6 be in the normal range.

7 Q. All right. Doctor, as a result of your examination
8 of Mr. Murphy, you said that the -- there is some profound
9 neuropathy in both nerve trunks. Now, what nerve trunks are
10 you talking about, in terms of that neuropathy?

11 A. Well, that relates -- that sentence relates to the
12 central responses part of the test. That's a little
13 different from the nerve conduction study. Central responses
14 are another way of getting information about sort of the
15 global way a nerve trunk carries a signal. Basically the
16 central response is a measure of the conduction time from the
17 stimulation point up to the cervical spinal cord and back
18 again to a recording point down here. So you're looking at
19 the transient time, if you will, for a signal. And that
20 gives you a sense globally of how intact, how intactly
21 functioning is a nerve trunk. So it gives you a hint of
22 whether there's neuropathy or not.

23 Q. You got through your examinations more than a hint
24 of neuropathy, didn't you?

25 A. Well, there was -- there were -- there certainly is

1 neuropathy. I mean, it's greater below the wrist of the
2 median motor nerve. It's -- the amplitude is really down, so
3 it's really a severe neuropathy below the wrist, but again not
4 a great surprise in view of the history.

5 The ulnar sensory showed some low amplitude. Again,
6 not a surprise, given the thumb injury. So there's no
7 surprises here based on the history. The central responses,
8 again, were quite prolonged. The values that we generated in
9 both median and ulnar nerve do suggest there are really
10 marked degrees of neuropathy in both trunks.

11 Q. And would you describe for the jury in laymen's
12 terms the practical effect of that neuropathy on the
13 operation of Mr. Murphy's left hand? Does he have less
14 sensation or less gripping ability, or you tell us?

15 A. Well, we didn't discuss the motor findings, but
16 again, the ability to use thumb properly certainly was born
17 out on the motor exam. The ability to maintain finger
18 strength was weaker in the left hand. The ability to flex
19 distally in the left hand was weaker compared to the right.
20 So I mean on exam there's that kind of data. That -- that
21 there's -- neuropathy type data on the motor conduction
22 study, at central response, fits the clinical exam. I mean,
23 you can look at it one of two ways. You can do -- do a
24 clinical exam first, which is what I did, and then
25 corroborate your clinical findings by looking at sort of

1 objective data. Or you can generate objective data first not
2 knowing anything about the person and then go and do an exam
3 and see whether the exam bears out motor and sensory findings
4 in both nerve trunks. So we don't have the luxury of having
5 done it the second way. We did the exam first and generated
6 the data second. But in point of fact, the data fits the
7 clinical exam.

8 Q. And is it your conclusion then that Mr. Murphy does
9 have neuropathy to the extent that he would lose some
10 sensation or have some numbness in his fingers and his thumb
11 of his left hand?

12 A. Yes. As clinically born out, I think he does have
13 loss sensation below the scar on the ventral side. And he's
14 got loss of sensation on one half of the thumb from the thumb
15 injury. And that forces him because of lack of knowing where
16 his -- all of that translates into other potential
17 consequences in the sense that in effect with eyes closed,
18 his brain doesn't know where the tips of his fingers are or
19 where the side of his thumb is because the brain is very
20 dependent on what we call proprioceptive type information.
21 And proprioception is just a fancy word for feedback about
22 the position of extremity part in space. So even with eyes
23 open, there can be difficulty when you have numbness in -- in
24 manipulating fine objects, in picking up a staple or
25 something small, things of that nature.

1 MR. BYCK: Thank you, Doctor. Pass the
2 witness.

3 Cross-Examination

4 By Mr. Davis:

5 Q. Doctor, would you consider a .22 caliber pistol to
6 be a fine object?

7 A. A --

8 Q. Fine object?

9 A. No, I would not.

10 Q. Dr. Krusz, you and I met for the first time this
11 morning; is that correct?

12 A. Yes, sir.

13 Q. You were asked to see this individual. Had you
14 ever -- had you ever evaluated an individual who was accused
15 of capital murder before?

16 A. Yes.

17 Q. Okay. Would you agree with me that when the
18 defendant came in to give you certain information, that he
19 had a clear motive not to tell you the truth in this matter?

20 A. I suspect that could be true.

21 Q. Did you understand what his claims would be in this
22 particular case?

23 A. I asked no questions about anything to do with this
24 case, of this gentleman.

25 Q. Okay. So I understand that no police reports were

1 provided to you?

2 A. That's correct.

3 Q. Okay. No summaries of testimony?

4 A. None.

5 Q. So that when -- when you came in and you took the
6 history from this individual -- and first of all, that's a
7 normal part of every examination, isn't it, to take a history
8 from a patient?

9 A. Yes.

10 Q. What's the purpose of taking a history?

11 A. Well, it's to get a sense of what the problem that
12 they're seeing you for, how it started, when it started,
13 circumstances of how it's progressed, historical features of
14 it.

15 Q. Uh-huh. Okay. I mean, that's a very helpful part
16 of an examination for you as a physician, correct?

17 A. Well, it can be, yes.

18 Q. And when a patient gives you a history, I take it
19 you expect the individual to tell you the truth about his
20 history, don't you?

21 A. I do.

22 Q. All right. And when the defendant gave you a
23 history in this matter that in 1996, that a .22 caliber
24 handgun had discharged and that bullet fragments had lodged
25 in his hand, I take it you took him at his word, didn't you?

1 A. I did.

2 Q. I mean, you've -- have you had people who would lie
3 about their history before?

4 A. Yes.

5 Q. You can detect that sometimes, can't you?

6 A. Sometimes.

7 Q. Sometimes you can't?

8 A. That's correct.

9 Q. In this particular instance, sir, did you know that
10 the defendant had lied to you about the history he gave you
11 of that injury?

12 A. No.

13 Q. Okay. Were you ever provided with any of the
14 medical records concerning prior medical care that Mr. Murphy
15 may have received to his left hand?

16 A. No.

17 Q. Specifically, have you ever had the opportunity to
18 review the records from Doctors Hospital in New Boston,
19 Texas; the records from Wadley Regional Medical Center in
20 Texarkana; the records from St. Michael's Hospital in
21 Texarkana; the records of Dr. Jeffrey DeHaan in Texarkana;
22 the records of Dr. William Vandiver from Kaufman, Texas; or
23 the records from Dr. James Garrison in Dallas and Kaufman?

24 A. I have not.

25 Q. So you have no idea whether this individual has

1 given different accounts of his history to other doctors,
2 have you?

3 A. I do not.

4 Q. You're not aware then, Doctor, that when this
5 defendant came in to the Doctors Hospital in New Boston in
6 1996 for treatment of his hand, that x-rays were taken of his
7 left hand? You don't know that?

8 A. No.

9 Q. Have you had an -- well, since you don't know that,
10 I take it, that you don't know that x-rays indicated that a
11 pellet was lodged in his left hand rather than a .22 caliber
12 bullet. You're not aware of that, are you?

13 A. No.

14 Q. You're not aware that there were no bullet
15 fragments, that simply there was a single pellet lodged in
16 his hand. You're not aware of that, either, are you?

17 A. No.

18 Q. The defendant gave you a history that he had
19 suffered numbness in his second, third, fourth, and fifth
20 fingers since the date of that injury. Were you aware that
21 when he came into the hospital prior to surgery, that he
22 complained only of loss of sensation to the third, fourth,
23 and fifth fingers?

24 A. I'm not aware of that.

25 Q. Are you aware that surgery was performed on the left

1 hand? I take it that you assumed that from the scars that
2 you saw?

3 A. And from his history, yes, sir.

4 Q. All right. Were you aware that Dr. DeHaan, the
5 orthopaede who performed the surgery, specifically noted that
6 there was no lacerations to the median nerve of his left
7 hand? Are you aware of that?

8 A. Not aware of that, no.

9 Q. Are you aware that two weeks after the surgery that
10 Mr. Murphy came back to St. Michael's Hospital in Texarkana
11 and at this time his only complaint was numbness to the
12 fourth and fifth fingers of his left hand? Are you aware of
13 that?

14 A. No.

15 Q. Were you even aware that Mr. Murphy had already
16 undergone another nerve conduction velocity study by another
17 physician back in 2000?

18 A. No.

19 Q. Do you know a Dr. James Garrison?

20 A. Yes.

21 Q. What do you know of Dr. Garrison?

22 A. He's an excellent physiatrist.

23 Q. Basically he practices physical medicine, right?

24 A. Correct.

25 Q. And in that field he would sometimes perform the

1 same type of neurologic exams or tests that you might
2 perform, correct?

3 A. Correct.

4 Q. So as I understand, you were not aware that on
5 September the 7th of the year 2000, that he in fact performed
6 nerve conduction studies to the left thumb of Jedidiah
7 Murphy?

8 A. No.

9 Q. You've never been provided with a copy of his
10 report?

11 A. No.

12 Q. So you don't know what the results of those tests
13 may have been prior to the time that you actually saw him and
14 conducted your own nerve conduction studies?

15 A. No, sir, I do not.

16 Q. Again, the sensory portion of this test, that's
17 subjective, isn't it?

18 A. Yes.

19 Q. I believe your testimony was that you're dependent
20 on the information given to you by the patient?

21 A. Yes. I called it sort of a weak link in the
22 neurologic exam.

23 Q. Again, sometimes people come in and they try to fool
24 you, sometimes they don't, correct?

25 A. Correct.

1 Q. So the vast majority of people don't try to fool
2 you, do they?

3 A. That's correct.

4 Q. Sometimes you're able to catch them. Sometimes you
5 can't catch them.

6 A. True.

7 Q. And as I understood you to say that you knew that
8 the defendant had suffered an injury back in 1996 that
9 required surgery to his left hand. You were also aware of a
10 thumb injury in the year 2000. And then you were made aware
11 of an injury to the defendant's left wrist that occurred
12 sometime in May of the year 2001, correct?

13 A. Yes.

14 Q. Were you given any medical records from the injury
15 that occurred in May 2001?

16 A. I was not.

17 Q. Now, an injury to the wrist certainly could have an
18 affect upon the motor and the sensory functions of nerves in
19 the hand blow the wrist, couldn't it?

20 A. It could, but -- except that that particular
21 location would be sort of unlikely to do that.

22 Q. Still it's possible, isn't it?

23 A. Only if you were miswired, I guess.

24 Q. Uh-huh. I want to talk to you about the findings of
25 your nerve conduction studies. First of all, going back

1 again to the motor function for the median nerve, can you
2 tell the members of the jury precisely what muscles and what
3 fingers would that particular motor function control in the
4 left hand?

5 A. Well, the median nerve has a lot of functions that
6 relate to thumb functioning so the ability to pick up your
7 thumb to hitchhike would be a classic example of almost pure
8 median nerve directed motor function. Then various ways of
9 moving your thumb in space, including the ability to do this,
10 make an okay sign and hold it tightly would also be in part
11 median nerve directed, but certainly the median nerves also
12 supplies the first three fingers really -- first two and a
13 half fingers, so motor functions relating to flexion would be
14 more median nerve directed. And of course there are -- there
15 are also -- I think you asked me specifically about motor
16 function?

17 Q. Yes, sir, about motor.

18 A. Yeah.

19 Q. Right. So it's basically the flexion. It's the
20 ability to, what, oppose the thumb to the second finger --

21 A. Yes.

22 Q. -- would be another function, and also the ability
23 to flex the thumb?

24 A. Portions of flexion, extension, apposition,
25 abduction, adduction.

1 Q. But basically as you're relating then, the ability
2 to grip an object, for instance, would be controlled by the
3 median motor?

4 A. No, because that becomes a mixed nerve function.
5 The ability to grip an object at that point requires
6 coordination of median and ulnar nerves as well. In general,
7 though we start talking about flexion in the last two digits
8 or last two and a half digits, you start bringing in ulnar
9 nerve functioning more and more, so the median and the ulnar
10 nerve trunks ultimately have to cooperate, so to speak.

11 Q. Basically the motor -- the median motor then would
12 control the ability of the thumb, the second and the third
13 finger to grip. The ulnar motor is now controlling primarily
14 the fourth and the fifth fingers' ability to contribute to
15 that grip; would that be fair?

16 A. Except for a muscle here, the ulnar nerve curiously
17 enough does control the muscle that you can feel if you sort
18 of smash your thumb against your second -- your forefinger.
19 That muscle is called the first dorsal interossei, and that's
20 specifically innervated by the ulnar nerve.

21 Q. The median motor here, the forearm, the function
22 from, what, the -- the elbow to the wrist, correct?

23 A. Yes.

24 Q. All right. The values there, as far as the
25 conduction velocity study, that was well within normal,

1 wasn't it?

2 A. Yes.

3 Q. Which would indicate what?

4 A. Just that the -- well, when you do the calculation,
5 you take the distance from one stimulation point to another,
6 and then the amount of time it took. You divide the distance
7 by the time. The rate, the speed with which the signal was
8 conducted down the motor trunk was within normal limits.

9 Q. Okay.

10 A. That's all that data gives you.

11 Q. Okay. So this is -- this is within normal limits.
12 Now, looking across the wrist, the only abnormal number that
13 you got of the three studies was the amplitude, correct?

14 A. Yes.

15 Q. The conduction velocity, as a matter of fact, was
16 well within normal, wasn't it?

17 A. Yes.

18 Q. I mean, to be normal it had to be greater than 50.
19 You found this individual down here to have a reading of 57,
20 didn't you?

21 A. Yes.

22 Q. The distal latency was well within normal, correct?

23 A. Yes.

24 Q. And the only abnormality was a slight decrease in
25 the amplitude, correct?

1 A. In the forearm and greater, so below the wrist.

2 Q. Okay. Now, you know, when you talk about this
3 individual's ability to use his left hand motor wise, you
4 didn't have the benefit of any of his work records, did you?

5 A. No.

6 Q. Did you know how he had been employed in the past?

7 A. Very partially. Just in describing the 2000 injury
8 to the thumb, he described that in a setting of a work
9 injury --

10 Q. Okay. Did you know that he did work that required
11 the use of his left hand to grip and to flex? Did you know
12 that?

13 A. Well, that was my impression that the work -- the
14 thumb injury was in -- he was using his hands at work at the
15 time of the thumb injury.

16 Q. Did you know that in 2000 that this individual
17 worked as a welder?

18 A. I believe he mentioned that.

19 Q. Yeah. And I take it since you didn't have the work
20 records, you didn't have an opportunity to speak with any of
21 his coworkers, did you?

22 A. Did not.

23 Q. To see how his hand had functioned in a workplace
24 setting prior to his thumb injury. You didn't have that
25 benefit, did you?

1 A. No.

2 Q. Didn't have a chance to talk with Harlan Bailey of
3 Griffin Products?

4 A. No, sir.

5 Q. Didn't have an ability to talk with Shirley Bard of
6 R & R Designs either, did you?

7 A. No, sir.

8 Q. And when Mr. Byck asked you about the usefulness of
9 testing the right side against the left side, I believe your
10 testimony was that your expectations would be that the
11 results would be in the normal range, correct?

12 A. Yes.

13 Q. The normals simply are averages, aren't they?

14 A. Yes, they're normed on things like ages. And in
15 some cases the central responses, they're also normed on
16 height because it's the distance of the nerve trunk involved.

17 Q. Yeah. I mean, let's assume that I don't have any
18 injuries, any nerve injuries to my left hand. If you tested
19 the conduction velocity rate for my median sensory function,
20 I believe the normal is greater than 51, correct?

21 A. Yes, sir.

22 Q. Is my rate going to be 51?

23 A. It should be 51 or better.

24 Q. Should be. Is it possible it could be a little bit
25 lower and still be normal? Since 51 is an average, I assume

1 there are some who are a little bit below that, there are
2 some who are a little bit above that to get an average.

3 A. Well, these norms are taken from some reference
4 textbooks on nerve conduction velocity studies. A colleague
5 of mine was involved in generating them, and I think most
6 people who do nerve conductions would accept these numbers --

7 Q. Uh-huh.

8 A. -- as valid, so, no, I think if you generate a 49,
9 it's slightly slowed. If you generate a 53, it's normal, or
10 a 52, it's normal. If you're right at 51, then you're at
11 the -- you know, you're right on the -- you're well -- you're
12 in the normal range.

13 Q. So when the defendant generated a 49.4, that was
14 just slightly lower, that's all?

15 A. Correct.

16 Q. It wasn't profound, was it?

17 A. No.

18 Q. As a matter of fact, the amplitude for his median
19 sensory was normal, correct?

20 A. Correct.

21 Q. And the distal latency was well within normal,
22 also?

23 A. Yes.

24 Q. So the only deviation on his median sensory function
25 was approximately a 3 percent deviation from the normal

1 expected value on the normal conduction velocity meter per
2 se?

3 A. Right.

4 MR. DAVIS: No further questions, Your Honor.

5 Redirect Examination

6 By Mr. Byck:

7 Q. Dr. Krusz, very briefly, if the subject you examined
8 on June the 1st, Mr. Murphy, came in unconscious, unable to
9 give you any medical history, would that change your
10 conclusion -- the conclusions that you've expressed here in
11 court today?

12 A. The only things I couldn't speak to would be the
13 motor and sensory exam.

14 Q. Right. He wouldn't be able to relate to that. As
15 far as prior medical records are concerned, the examination
16 that you did showed his status on June the 1st; is that
17 correct?

18 A. Yes.

19 Q. Would -- would all the medical records that the man
20 had ever accumulated helped you in any way in reaching your
21 conclusions?

22 A. Not as far as what I generated on June the 1st.

23 MR. BYCK: Thank you, Doctor. Pass the
24 witness.

25 MR. DAVIS: No further questions.

1 MR. BYCK: No further questions. May this
2 witness be excused?

3 THE COURT: He may.

4 (Defense Rests)

5 MR. BYCK: Ladies and gentlemen of the jury,
6 the defense rests.

7 MR. DAVIS: The State closes, Your Honor.

8 MR. BYCK: And close.

9 (Both Sides Close)

10 THE COURT: Close the testimony, Ms. King.

11 Ladies and gentlemen of the jury, as I indicated to
12 you before we adjourned yesterday, we will stand in recess
13 until Monday morning. We're going to stay and work on the
14 Court's charge. You however may go. Each of you have a
15 pleasant weekend. See you Monday morning, jury room, 9:00
16 a.m.

17 THE BAILIFF: All rise.

18 (Jury recessed from courtroom.)

19 THE COURT: Visitors of the gallery, you may
20 be seated or excused as you wish.

21 MS. BALIDO: Judge, first on the record we had
22 some motions that you were taking under advisement that I had
23 discussed with you this morning that we could go ahead and
24 close in front of the jury and still be able to take up as we
25 work along today.

1 THE COURT: I acknowledge.

2 MS. BALIDO: Okay. That included the Motion
3 to Suppress on -- I guess we need a final ruling on the
4 Motion to Suppress of the statements, the Motion to Suppress
5 on the jail seizure of property, where we may have one more
6 witness on that. And then I think that's it at this point.
7 And so we can take those up as time permits today.

8 But for the purposes of this hearing, I'd like to
9 call my client, Jedidiah Isaac Murphy. Can he just do it
10 from the table?

11 THE COURT: He may.

12 Raise your right hand, please.

13 (Defendant sworn.)

14 THE DEFENDANT: Yes, sir.

15 JEDIDIAH ISAAC MURPHY

16 the defendant, was called as a witness in his own behalf and,
17 after having been first duly sworn, testified as follows:

18 Direct Examination

19 By Ms. Balido:

20 Q. Can you please state your name for the record?

21 A. Jedidiah Isaac Murphy.

22 Q. And, Mr. Murphy, before testimony began this
23 morning, you and I had a conversation as to your right either
24 to testify in this matter or not to testify in this matter;
25 is that true?

1 A. Yes, ma'am.

2 Q. And I explained to you that that is your decision
3 and your decision alone?

4 A. Yes, ma'am.

5 Q. And we discussed all the pros and cons of you
6 testifying and not testifying, and we came to the decision
7 and specifically you came to the decision not to testify at
8 this portion of the trial?

9 A. Yes, ma'am.

10 Q. You need to say yes?

11 A. Yes, ma'am.

12 Q. Okay. And that's your decision and your decision
13 alone?

14 A. Yes, ma'am.

15 MS. BALIDO: No further questions, Judge.

16 THE COURT: Mr. Murphy, do you have any
17 questions for me with regard to your right either to testify
18 or not to testify?

19 THE DEFENDANT: No, sir.

20 MS. BALIDO: Nothing further, Judge.

21 THE COURT: For Darline's sake, let's take
22 about a 10-minute break and then we'll resume.

23 (Recess.)

24 THE COURT: This is continuation of the
25 hearing with regard to the seizure of certain items from a

1 Dallas County Jail cell. This hearing is continuing outside
2 the presence and hearing of the 12 jurors and the alternate.
3 Mr. Murphy is present in court and will be while -- at all
4 times while this hearing continues.

5 Ms. Balido, do you wish to call Mr. LePere?

6 MS. BALIDO: Yes, please.

7 THE COURT: Ray, if you please.

8 (Witness brought forward.)

9 THE COURT: May I ask that you raise your
10 right hand, sir.

11 (Witness sworn.)

12 THE WITNESS: I do.

13 THE COURT: Thank you, sir.

14 RAY LaPERE

15 was called as a witness by the Defendant and, after having
16 been first duly sworn, testified as follows:

17 Direct Examination

18 By Ms. Balido:

19 Q. Can you please state your name for the record?

20 A. Yes, ma'am. Ray, R-a-y, LePere, L-e, capital
21 P-e-r-e.

22 Q. And how are you employed, sir?

23 A. I'm a Deputy Sheriff in Dallas County.

24 Q. And what is your assignment within the Sheriff's
25 Department?

1 A. I'm property and evidence officer.

2 Q. Okay. I've asked you to be here in regard to some
3 property that was seized from a Jedidiah Isaac Murphy. Do
4 you understand that?

5 A. Yes, ma'am.

6 Q. Okay. And there was an occasion that the District
7 Attorneys Office, or specifically Ms. Miller and Mr. Davis
8 came down and looked at some property that was seized from
9 Mr. Murphy's cell; is that correct?

10 A. That's correct.

11 Q. Okay. How did that go about happening?

12 A. I received a call from them on May 22nd of this
13 year, and they asked if they could see the evidence. I met
14 them downstairs in the property room. I opened the envelope,
15 and I pulled the pieces of paper out one by one so they could
16 look at them.

17 Q. Okay. And made copies for them if they --

18 A. Yes.

19 Q. -- wanted them?

20 A. Uh-huh, yes.

21 Q. And then returned those papers back into the packet?

22 A. Yes, ma'am, every one of them.

23 Q. Did they show you a subpoena for those papers?

24 A. No, ma'am, they did not.

25 Q. And did they -- or did they show you a warrant for

1 those papers?

2 A. No, they did not.

3 Q. Okay. Let me ask you, was there any sort of sign-in
4 or sign-out procedure for them to go down there with you?

5 A. I signed them in, and I signed them out.

6 Q. Okay. Let me ask you if me or Ms. Little or Mr.
7 Byck as one of the defense lawyers had wanted to see that
8 information, could we have done the same thing?

9 A. I'm sure that you could.

10 Q. Okay. Would we have had to have had a subpoena to
11 look at those records?

12 A. Or an order from the Judge.

13 Q. Okay. So for us to look at them, we would
14 probably -- or would we need a subpoena or an order from the
15 Judge to see those records?

16 A. In past cases I've had Judges call me and tell me to
17 bring evidence so that the defense lawyers could look at
18 them.

19 Q. Okay. But absent an intervening act by the Judge,
20 could we just call you up and say we wanted to see the stuff
21 that you seized?

22 A. I haven't had that happen to me yet.

23 Q. Okay. Just the regular practice up until this point
24 is that usually for defense lawyers to see, it's usually with
25 the act of either a Judge calling or --

1 A. Or a subpoena or a warrant, sure.

2 Q. Okay.

3 MS. BALIDO: Nothing further, Judge.

4 Cross-Examination

5 By Mr. Davis:

6 Q. Mr. LePere, when Ms. Miller and I came down, my
7 understanding is from your testimony that when we finished
8 reviewing the documents, you retained custody of those
9 documents, correct?

10 A. I did.

11 Q. And neither Ms. Miller nor myself were permitted to
12 take any of those documents from the Sheriff's property room,
13 were we?

14 A. None.

15 Q. And in this case, to your knowledge, did the defense
16 attorneys representing Jedidiah Murphy make any effort to
17 view those objects in your possession?

18 A. No, sir.

19 Q. Did you ever receive a call from Judge Entz or any
20 other Judge requesting that you make the documents available
21 to them?

22 A. No, sir.

23 Q. To your knowledge, did any of the three attorneys
24 representing Mr. Murphy come to the Sheriff's property room
25 or call you requesting the ability to see those documents?

1 A. No, sir.

2 MR. DAVIS: That's all I have, Judge.

3 THE COURT: Ms. Balido.

4 Redirect Examination

5 By Ms. Balido:

6 Q. Mr. LePere, although they did not physically take
7 the documents from your possession, did -- from what you saw,
8 did they look at all the documents within the packet that was
9 seized?

10 A. I opened the package, and I would give them document
11 by document. Some of them they would look at. Some of them
12 they would hand back to me, and I kept in a pile. They were
13 under my control, care, and custody at all times.

14 Q. Okay. But the Sheriff's Office did make copies for
15 whatever they wanted to see out of that packet?

16 A. Yes.

17 Q. Was -- earlier this week, I believe it was Monday,
18 did you come up to court and bring that packet to court?

19 A. Yes, ma'am.

20 Q. Okay. And that's the first time -- and you turned
21 it over to the defense attorneys --

22 A. Yes, ma'am, at 9:30 a.m. on 6-4-01.

23 Q. Okay. And it was signed off by Michael Byck, one of
24 the attorneys?

25 A. Yes, ma'am.

1 Q. Let me ask you, if Mr. Murphy had wanted to get back
2 that property, would there be a way for him to request --
3 because I believe that some of it was pictures and stuff like
4 that; is that correct? Or do you recall?

5 A. Ma'am, I don't recall.

6 Q. Okay.

7 A. Basically it's assorted written material.

8 Q. Okay. If he had wanted to get back some of that
9 assorted written material, what would he have had to do to
10 get that back?

11 A. He would have had to have the detective handling the
12 case to order me to give it back to him.

13 Q. Okay. So probably he would have had to send a kite
14 to the detective handling the case saying he wanted some
15 stuff back?

16 A. Yes.

17 Q. But you didn't require anything from the District
18 Attorneys Office in writing to show them that material?

19 A. No.

20 MS. BALIDO: Pass the witness.

21 MR. DAVIS: No further questions.

22 MS. BALIDO: No further questions, Judge.

23 THE COURT: May he be excused?

24 MS. BALIDO: He may be excused.

25 MR. DAVIS: No objection.

1 THE COURT: Again, we apologize for delaying
2 you, sir.

3 THE WITNESS: No problem, Judge.

4 THE COURT: Any other -- off the record,
5 Darline.

6 (Discussion off the record.)

7 MS. BALIDO: Judge, we made the bulk of our
8 argument yesterday based on our Motion to Suppress, the
9 materials that were seized by the Sheriff's Department and in
10 our argument subsequently seized by the District Attorneys
11 Office. Based on the testimony of Deputy LePere, we would
12 show that again they were not seized with a search warrant or
13 a subpoena. And based on it being a subsequent search or a
14 subsequent seizure after the initial seizure by the Sheriff's
15 Department for proper institutional purposes, we would say
16 that that part of the seizure by the District Attorneys
17 Office constituted an illegal search under the Fourth
18 Amendment and also under Article 1, Section 9, of the Texas
19 Constitution and the due course of law provision.

20 Additionally, when we go even farther into the
21 attorney-client privilege, we would like to make an
22 additional argument on the record that -- first, that the
23 harm is per se based on the attorney-client privilege being
24 sacrosanct under law. And that secondly, that we can show
25 harm that although the District Attorney could show that he

1 did not use it to look for any additional information, we
2 would show that the harm could be implied by the fact that he
3 knew which direction the defense was going and the problems
4 that we thought he had with the State's case and therefore
5 would know that he wouldn't have to go any further and so
6 that would be an implied harm. And I believe that based on
7 those additions, we would stand on our Motion to Suppress and
8 ask that you suppress the evidence.

9 THE COURT: The Court, after further
10 consideration of the testimony of Mr. LePere and argument of
11 counsel, find again that there is no Fourth Amendment
12 constitutional right, especially under the circumstances as
13 were presented by the seizure of the materials from the cell
14 of Jedidiah Isaac Murphy. I furthermore find that if though
15 error was committed, it was harmless beyond a reasonable
16 doubt under this circumstance.

17 MS. BALIDO: And, Judge, again, we'd ask you
18 make a ruling or finding of fact and conclusion of law based
19 on -- well, make the finding of fact and conclusion of law
20 that the materials in Defendant's Exhibit 6A, B, and C were
21 subject to the attorney-client privilege.

22 THE COURT: I find that a portion of the
23 materials were attorney-client privilege, arguably those in
24 the handwriting of Jedidiah Isaac Murphy. However, I find
25 those other matters were not communications either from Mr.

1 Murphy to counsel or from counsel to Mr. Murphy, but were of
2 a personal nature from either family members and/or friends
3 and were not subject to attorney-client privileges.

4 MS. BALIDO: So specifically, Judge, the
5 papers, the three written pages that constitute Defendant's
6 6A, 6B, and 6C?

7 THE COURT: Those are the handwritten?

8 MS. BALIDO: Yes.

9 THE COURT: Yes.

10 MS. BALIDO: That they are --

11 THE COURT: That those arguably could be
12 construed as attorney-client privilege perhaps, but in light
13 of where they were, I don't know if it was in a secure and
14 confidential place.

15 MS. BALIDO: Okay, Judge. Thank you.

16 THE COURT: Was it not opened for other
17 inmates in the cell to see? Was it not available to guards
18 and other people?

19 MS. BALIDO: Judge, I believe if you'll take a
20 look at Defendant's 6A, B, and C, you will see that the way
21 that they were when I pulled them out of the envelope, which
22 I don't know if they're still the way that they are now --

23 THE COURT: They were folded.

24 MS. BALIDO: They were all folded up with the
25 outside saying to my attorneys. That's part of -- of

1 Defendant's Exhibit 6C.

2 THE COURT: The question remains had -- had
3 there been hypothetically a search of all the cells for
4 contraband, was the papers about which the defense makes
5 reference in such a way that they would not have been subject
6 to examination to determine whether or not contraband may
7 have been contained therein?

8 MS. BALIDO: Well, Judge, I think that Chief
9 McKinney basically talked about the way that they search
10 attorney-client privileges -- privileged information and
11 materials for contraband. And I would assume that if the
12 Sheriff's Department had that legitimate institutional
13 security interest, that they would use the same or similar --

14 THE COURT: Means.

15 MS. BALIDO: -- means and protections to
16 protect the people that are sitting in the Dallas County Jail
17 because if they didn't, then basically the people that are
18 sitting there waiting for trial could have no attorney-client
19 privilege to anything that they wrote and pursuant -- in
20 pursuance of trial and that would implicate equal protection
21 arguments based on indigent and non-indigent defendants.

22 THE COURT: I understand. Furthermore, the
23 Court sayeth not.

24 MS. BALIDO: Furthermore, the lawyer sayeth
25 not.

Reporter's Certificate

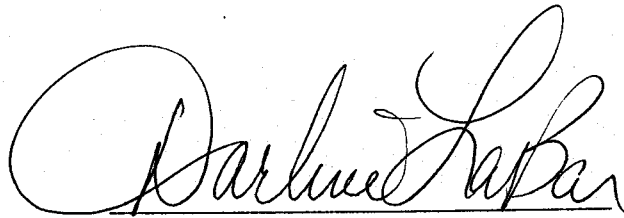
STATE OF TEXAS:

COUNTY OF DALLAS:

I, Darline W. LaBar, Official Court Reporter of the
194th Judicial District Court, in and for Dallas County,
Texas do hereby certify that the foregoing volume constitutes
a true, complete and correct transcript of all portions of
evidence and other proceedings requested in writing by
counsel for the parties to be included in the statement of
facts, in the above styled and numbered cause, all of which
occurred in open court or in chambers and were reported by
me.

I further certify that this transcription of the
record of the proceedings truly and correctly reflects the
exhibits, if any, offered by the respective parties.

Witness my hand this the 28th day of October, A.D.,
2001.



DARLINE W. LABAR
Official Court Reporter
194th Judicial District Court
Dallas County, Texas
(214) 653-5803

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REPORTER'S RECORD

VOLUME 52 OF 65 VOLUMES

74145

TRIAL COURT CAUSE NO. F00-02424-NM

THE STATE OF TEXAS : IN THE DISTRICT COURT
VS. : DALLAS COUNTY, TEXAS
JEDIDIAH ISAAC MURPHY : 194TH JUDICIAL DISTRICT

TRIAL ON THE MERITS BY JURY

FILED IN
COURT OF CRIMINAL APPEALS

A P P E A R A N C E S:

DEC 5 2001

HONORABLE BILL HILL, Criminal District Attorney
Crowley Criminal Courts Building
Dallas, Dallas County, Texas 75207
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Troy C. Bennett, Jr., Clerk

BY: MR. GREG DAVIS, A.D.A., SBOT # 05493550
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FOR THE STATE OF TEXAS;

MS. JANE LITTLE, Attorney at Law, SBOT # 12424210
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MS. JENNIFER BALIDO, Attorney at Law, SBOT # 10474880
Dallas County Public Defenders Office
Dallas, Texas 75207
Phone: 214-653-9400
FOR THE DEFENDANT.

On the 11th day of June, 2001, the following
proceedings came on to be heard in the above-entitled and
numbered cause before the Honorable F. Harold Entz, Jr.,
Judge presiding, held in Dallas, Dallas County, Texas:

Proceedings reported by machine shorthand, computer
assisted transcription.

DARLINE W. LABAR, OFFICIAL REPORTER

ORIGINAL

1	INDEX VOLUME 52		
2	June 11th, 2001	PAGE	VOL.
3	Proceedings.....	2	52
4	Objections to Court's Charge.....	2	52
5	Charge of the Court Read.....	11	52
6	Argument By Ms. Miller.....	11	52
7	Argument By Mr. Byck.....	21	52
8	Argument By Ms. Balido.....	24	52
9	Argument By Mr. Davis.....	37	52
10	Verdict of the Jury on Guilt/Innocence.....	50	52
11	Reporter's Certificate.....	62	52

12

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14

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1 P R O C E E D I N G S

2 THE COURT: The attorneys have had a bit of
3 time to evaluate the contents of the charge as it now
4 exists. Does the State have any objection?

5 (Objections to Court's Charge)

6 MR. DAVIS: The State has no objection.

7 THE COURT: Ms. Balido, you may proceed on
8 behalf of the defense.

9 MS. BALIDO: Thank you, Judge.

10 Comes now defendant, Jedidiah Isaac Murphy, and
11 objects to the Court's charge as prepared on the following
12 reasons or on the following grounds: First, we would object
13 to the venue instruction included in the charge basically
14 because it is our contention that venue in this case should
15 attach to the murder itself and not the aggravating
16 circumstances surrounding the murder.

17 Additionally, we would object to the use of 13.17 of
18 the Code of Criminal Procedure using that instruction to give
19 definitions of venue to the jury, based on that it
20 unconstitutionally lessens the burden of proof as to a
21 material fact in this case with these facts. And we would
22 make that objection based on the 5th, 6th, 8th, and 14th
23 Amendment of the United States Constitution, Article 1,
24 sections 10, 13, 19, and the due course of law provisions of
25 the Texas Constitution and 2.01 of the Penal Code which talks

1 about reasonable doubt.

2 We would additionally object -- so basically we're
3 objecting to all of the venue statute. An alternative, we
4 would object that only the venue statute that is involved
5 with murder, which is 13.17, be allowed to go to the jury.
6 An alternative to that, if the Court is relying upon -- and
7 the Court is relying upon in this case Article 13.19 and
8 13.07 of the Code of Criminal Procedure, we would object to
9 that as -- that the State needed to plead that with
10 specificity at the beginning of this trial. Information as
11 to whether or not an issue -- whether or not this was going
12 to be an issue was in the hands of the State, and so the
13 defendant would not have any knowledge whether or not it
14 should be subject to a motion to quash the indictment.

15 And we would rely on Fairfield versus State, which
16 is 610 Southwest 2d 771 and 779, Texas Court of Appeals case,
17 1981, where the Court said it's unnecessary for the defendant
18 to put -- to put venue at issue by a special plea or negation
19 of the allegation venue must be proved how alleged. And we
20 would say that the State has not alleged venue in the way
21 that the jury charge now seeks the jury to have a finding and
22 therefore they should have pled this with specificity at the
23 beginning of this trial.

24 Additionally, we would now ask the Court to force
25 the State to elect which theory of the case that the State of

1 Texas seeks to go upon in front of this jury, based on what
2 the jury charge says in this case. It includes both
3 reference to the venue statute regarding theft, which is
4 incorporated into robbery, and also the kidnapping statute
5 regarding venue. And we'd like to make a formal request now
6 to force the State to elect.

7 THE COURT: The State choose to elect or the
8 State choose not to elect?

9 MR. DAVIS: The State does not choose to elect
10 regarding the aggravating circumstance of robbery or
11 kidnapping. The State does intend to elect as to the manner
12 and means of death, and we at this time do elect to go
13 forward with the theory of shooting with a firearm as opposed
14 to drowning in water.

15 MS. BALIDO: Judge, based on -- Judge, we'd
16 ask you now since the State has now elected which -- how
17 they're going to proceed in this case, we'd ask you to make a
18 formal ruling to force them to elect in this case, based on
19 kidnapping or robbery.

20 THE COURT: The Court declines to do so.

21 MS. BALIDO: Based on your ruling then, Judge,
22 we would argue that the venue statute or the venue
23 instruction as placed in the jury charge is multifarious and
24 against the double jeopardy clause of the -- of the United
25 States Constitution, as well as the other parts of the United

1 States Constitution and the Texas Constitution that we've
2 cited above basically because under the kidnapping -- well,
3 under the venue instruction as written, it is conceivable
4 that the jury could come back and find venue on at least four
5 and maybe as much as five different bases (sic), and the
6 danger is that it has four or five different bases of -- to
7 find venue. And if you don't find venue under those bases,
8 then it's a not guilty. So we have a situation that some
9 jurors could find venue under the kidnapping statute and then
10 find him guilty of capital murder under the robbery statute.

11 Additionally, there could be some jurors who could
12 find -- find venue under the kidnapping statute, but then
13 find him guilty of capital murder under the robbery statute.
14 And we'd say that is the danger of not forcing the State to
15 elect, and we would object on those grounds.

16 THE COURT: The Court finds that the Court of
17 Criminal Appeals in the Folsome case specifically addressed
18 that issue contrary to the objections raised by the defense.
19 The defense request is denied.

20 MS. BALIDO: Judge, additionally we would
21 argue that it could be proper to have the venue statute
22 attaching to kidnapping and also the statute attaching to
23 robbery if there were lesser included offenses included in
24 this case of robbery and kidnapping, but that's not done.
25 There's simply the murder -- every lesser included offense

1 that is included in this case is -- has to do with a
2 homicide, and therefore again we return to our original
3 argument that venue attaches to the murder itself.

4 We'd also object to the intoxication instruction
5 because we believe that intoxication is not a defense to this
6 charge, based on the fact that it does damage to the jury's
7 ability to include his physical state in considering the
8 degree of mental state to find someone guilty either of
9 manslaughter, murder, or capital murder, and we'd object to
10 that instruction being included.

11 Can I have a ruling?

12 THE COURT: Objection is denied. Also, the
13 venue objection is denied as well.

14 MS. BALIDO: Judge, we'd also request a jury
15 charge based on the Texas Penal Code 6.01, which is the
16 requirement of voluntary act or omission before someone can
17 be found guilty of or find -- well, found guilty in this
18 case. Basically we would like the -- the jury to be
19 instructed as under Alfred versus State and be instructed
20 that the term "voluntary" means an absence of an accidental
21 act, omission, or possession. Voluntariness refers only to a
22 body's -- a physical body's movements. And we would argue
23 that we need this additional Alfred instruction because we
24 are no longer afforded the instruction or the defense of
25 accident after Adernandus versus State, which is a Texas

1 Court of Appeals case, 1993.

2 We would additionally assert that Brown versus
3 State, 955 Southwest 2d 276, a Texas Court of Criminal
4 Appeals case in 1997 says, if the admitted evidence raises
5 the issue of conduct of the actor not being voluntary, the
6 jury shall be charged, when requested, on the issue of
7 voluntariness. And we would say that -- that in this case we
8 are entitled to that instruction and that the case that the
9 Court is relying upon, which is the George case, was decided
10 before Adernandus and also before -- therefore before we lost
11 the accident instruction.

12 We'd also -- can I have a ruling on that, Judge?

13 THE COURT: The Court specifically in light of
14 the contents of the statement given by Mr. Murphy to
15 Detective Myers denies the defense request with regard to the
16 issue of voluntariness of the act.

17 MS. BALIDO: We would like our -- the
18 objection also to be considered under the testimony of Ed
19 Hueske as well, Judge.

20 THE COURT: Request is denied.

21 MS. BALIDO: We would also request an
22 additional instruction regarding Texas Penal Code 6.02(a),
23 that a person does not commit an offense unless he
24 intentionally, knowingly, or recklessly engages in the same
25 conduct as the definition of the offense requires. And we

1 would just say if you're going to give us 6.01, we would like
2 6.02 as well, Judge.

3 THE COURT: Request is denied.

4 MS. BALIDO: And finally, Judge, and I bet
5 you're glad to hear me say finally. Finally, Judge, we would
6 argue that the law which the State seeks to apply in this
7 case and the Court has put forth in the charge, is different
8 from the law under which this jury was qualified. We asked
9 numerous questions regarding this case that the record will
10 be clear on specifically about proving Dallas County beyond a
11 reasonable doubt. And those questions to which the --
12 basically what happened is the State -- the defense brought
13 it up in their -- in their voir dire and then the State
14 accepted it and started using it on their own voir dire to
15 steal our thunder and we would argue that them taking on that
16 questioning in their own State's voir dire hereby estops them
17 from requesting a lesser burden of proof on venue at this
18 point. And we make that specifically under the 5th, 6th, and
19 14th Amendments to the United States Constitution, Article 1,
20 Sections 10, 13, and 19, and the due course of law provisions
21 under the Texas Constitution.

22 THE COURT: Request denied.

23 MS. BALIDO: Finally, Judge, and this is --

24 THE COURT: I thought we were finally the last
25 --

1 MS. BALIDO: It is. That's the finally on the
2 jury charge.

3 Judge, having closed our hearing on the material
4 seized by the Dallas Sheriff's Department and subsequently
5 seized by the Dallas District Attorneys Office, you've made a
6 finding as to whether or not those materials were
7 attorney-client privilege, and we'd request that you make a
8 finding on the record as to whether or not those constituted
9 work product between the defendant and his attorneys.

10 THE COURT: The Court so finds.

11 The trouble that the Court has continually had with
12 itself as relates to the three-page document allegedly in the
13 handwriting of the accused, Jedidiah Isaac Murphy, is that
14 although it would appear to be comments or content intended
15 for the attorney, the manner and means by which it was kept
16 in the cell of Jedidiah Isaac Murphy somewhat lessens the
17 privilege nature of the communication, in the Court's
18 opinion.

19 Plus, I also reiterate if error, it was the contents
20 and lack of utilization by the State made the constitutional
21 impropriety harmless beyond a reasonable doubt.

22 MS. BALIDO: And we would object to that
23 finding, Judge.

24 MR. DAVIS: Can we have a moment?

25 THE COURT: Sir?

1 MR. DAVIS: Can we have a moment with the
2 Court?

3 THE COURT: You may.

4 (Discussion off the record.)

5 THE COURT: May I ask the bailiffs to cause
6 the side door to be locked --

7 THE BAILIFF: Yes, sir, it is.

8 THE COURT: -- please. Not trying to chill
9 anybody's constitutional right to come in, but it is a bit
10 disconcerting to the attorneys and the jurors for that door
11 to be opened.

12 Sheriff, may we have the jury, please.

13 THE BAILIFF: Yes, sir.

14 (Jury returned to courtroom.)

15 THE BAILIFF: All rise.

16 THE COURT: Let the record reflect the jurors
17 are returning to the courtroom.

18 Jurors may be seated.

19 Mr. Murphy, counsel, visitors in the gallery, you
20 may be seated.

21 Ladies and gentlemen, before I begin reading the
22 Court's charge, I take note that you have been delayed this
23 morning as a result of me. I want to assure you that we
24 worked hard Friday. Fatigue set in very frankly, very
25 candidly, the attorneys and the Court. We did not finish the

1 task that we intended on Friday because of fatigue. We saw
2 ourselves going in circular motions and getting nothing done
3 so we all agreed to get some rest over the weekend and we've
4 been here since early this morning. At last we have a
5 completed charge I will read to you and then you'll begin
6 hearing from the attorneys. Again, I apologize.

7 Cause Number F00-02424-M, styled the State of Texas
8 versus Jedidiah Isaac Murphy, the charge of the Court as
9 follows --

10 (Charge of the Court Read)

11 THE COURT: Ladies and gentlemen, on the last
12 page of the charge, which happens to be page 21, you will
13 find a verdict form, whatever the unanimous decision of the
14 jury after deliberations may be.

15 We next proceed with summation by counsel. The
16 State having the burden of proof has the right both to open
17 and close. The State will open in the person of the
18 Honorable Mary Miller.

19 (Argument By Ms. Miller)

20 MS. MILLER: May it please the Court.

21 Jedidiah Isaac Murphy, Jim Murphy, Jim Ed Murphy,
22 whatever you want to call him, is a cold-blooded killer. On
23 October 4th of 2000, he preyed upon Bertie Cunningham. He
24 had the specific intent to take her life, the specific intent
25 to cause her death. And how did he do that? By shooting her

1 in the head with a firearm, a deadly weapon, and he did that
2 during the course of a robbery or a kidnapping. That's
3 capital murder, ladies and gentlemen, and nothing less.

4 The State told you on voir dire that that is what we
5 intended to prove beyond a reasonable doubt, and I would
6 submit to you that we have proven it beyond all possible
7 doubt.

8 Now, I know voir dire happened over three months ago
9 for some of you and just a few weeks ago for some of you, and
10 so I want to go over some of the things that we talked about
11 on voir dire. One of the important things that wasn't really
12 talked about a whole lot was venue. And when the Judge just
13 read it to you in the jury charge, you may have been
14 thinking, hey, that's something I didn't really hear about a
15 whole lot. That is Dallas County. That's what venue is.
16 During voir dire we talked to some of you about, well, if the
17 State doesn't prove Dallas County beyond a reasonable doubt,
18 could you follow the law and find the defendant not guilty.
19 But, ladies and gentlemen, that is not the law. And I want
20 to bring your attention to that because on page 11 of the
21 charge, and it continues on through, venue, Dallas County, is
22 not an element of the offense. And it must only be proven by
23 a preponderance of the evidence. And that's something that
24 we talked about on voir dire. The greater weight of the
25 credible evidence, more likely than not. It does not have to

1 be proven beyond a reasonable doubt, because it is not a
2 criminative element of the offense.

3 Now, where is venue proper? As the charge says,
4 venue is the county where the prosecution is -- of the
5 criminal offense is begun and tried. Well, that's Dallas
6 County, and that's why you as citizens of Dallas County are
7 sitting here on this particular case. There are several
8 different ways venue can be proper in Dallas County. First,
9 it's where the offense occurred, and I would submit to you
10 it's a reasonable deduction from the evidence that the
11 offense of capital murder occurred here in Dallas County.
12 When you look at the defendant's own statement, State's
13 Exhibit Number 7, he said that he came in contact with Bertie
14 Cunningham as he was walking along the road beside
15 Bleachers. He had not yet gotten to 635. You heard
16 Detective Myers tell you that that portion of Garland is
17 Dallas County, Texas. So I would submit to you that the
18 evidence shows that the offense occurred in Dallas County,
19 Texas, part of it.

20 He also said that they had not yet gotten to 635
21 when he made her quit driving and decided to put her in the
22 trunk of the car. Therefore, that also shows the offense
23 occurred in Dallas County.

24 Secondly, you can look at where the property is
25 stolen, in one county, and removed by the offender to another

1 county, in the county where the defendant took the property,
2 or in any other county through or into which he may have
3 removed the same. Why is that important in this particular
4 capital murder? Because we have alleged that it occurred
5 during the course of a robbery.

6 Theft. Robbery is theft, taking property from
7 another person without their effective consent. There was
8 obviously no effective consent by Ms. Bertie Cunningham when
9 she had a gun pointed at her head when he decides to take the
10 credit cards and her car. So what do you look at? The
11 county through which the property was carried. Well, you
12 know that the car and the credit cards traveled through
13 Dallas County because 2023 Portsmouth, Zach Mamot's house,
14 that is where the defendant picked up Zach Mamot and took him
15 back to. Well, you know the car went through Dallas County
16 in order to get there. Also, you have 9620 Harry Hines
17 Boulevard where the defendant attempted to use one of the
18 credit cards at the ATM machine, the Racetrac machine. That
19 is Dallas County, also. Also, you have 408 South Central
20 Expressway in Richardson, Texas, Dallas County. That is
21 Richardson Motor Sports. You know the defendant used the
22 stolen property there, the credit card, in order to buy two
23 Go-Peds -- three Go-Peds, two Sports and a Liquidmatic.

24 You also know that during all of those he was
25 driving Ms. Cunningham's car, another piece of the stolen

1 property from Ms. Cunningham. So as part of the robbery you
2 know when you look at all of the evidence that Dallas County
3 is also proper because of the places where the defendant used
4 these stolen merchandise, stolen credit cards.

5 Also, venue is proper if -- proper if person
6 receives an injury in one county and dies in another by
7 reason of such injury in the county where the injury was
8 received or where the death occurred or in the county where
9 the dead body is found. Well, we know Van Zandt County is
10 where it was found, but why is it also proper in Dallas
11 County? Well, because you also know from his statement that
12 it was Dallas County. Reasonable deduction from the evidence
13 that it was Dallas County where the injury occurred. But you
14 also know that her body was taken through at least Dallas
15 County because what did John Donahue tell you? He was the
16 DNA expert from the Department of Public Safety. Miss
17 Cunningham's blood was found at 23 -- 2023 Portsmouth, Zach
18 Mamot's house. So you know that she had to be in the trunk
19 at that time and her body -- the blood somehow leaked out at
20 2023 Portsmouth which is also Dallas County.

21 Fourth, you have to look at the county in which the
22 kidnapping offense was committed or in any county through,
23 into, or out of which the person kidnapped may have been
24 taken. Once again, you know because Zach Mamot's house is
25 2023 Portsmouth, Dallas County, you know she was obviously

1 taken through Dallas County because you know that her body
2 was not dumped until she was in Van Zandt County. So you
3 know the reasonable deduction from the evidence is her body
4 was in the trunk of that car when they went to the Washington
5 Mutual at 1225 East Belt Line Road in Richardson to use the
6 ATM there, 408 South Central Expressway in Richardson at
7 Richardson Motor Sports, 9620 Harry Hines Boulevard at the
8 Racetrac, the 2023 Portsmouth, and also you have the
9 defendant's own address where he was living in Richardson
10 with his sister Tonya Thorp.

11 So, ladies and gentlemen, venue is proper in Dallas
12 County several different ways, so I don't want you to get
13 hung up on that, but I wanted to clarify it because there was
14 a little bit of misinformation given to you on voir dire. It
15 must only be proven by a preponderance of the evidence. More
16 likely than not.

17 Now, what must be proven beyond a reasonable doubt,
18 the elements of the offense. What are the elements of the
19 offense? That's what the indictment sets out. In order for
20 it to be capital murder, we must show that the defendant had
21 the specific intent to kill. We must show that he intended
22 to take Ms. Cunningham's life, that he intentionally caused
23 her death by shooting her with a firearm, a deadly weapon,
24 that it was on October 4th, and it was during the commission
25 of a robbery or a kidnapping.

1 Well, you have the definitions of robbery and
2 kidnapping, ladies and gentlemen, in the Court's charge.

3 Robbery. It's during the commission of a theft,
4 with the intent to maintain -- obtain and maintain control of
5 property of another you either threaten or cause bodily
6 injury.

7 Kidnapping is when you abduct a person and you
8 secret them and move them from one place to another. I would
9 submit to you there's no question when you shove someone in
10 the trunk of a car and drive them around, you are obviously
11 kidnapping them. I would also submit when you take a
12 person's car, against their will, you use their credit cards
13 without their consent, and you do that by pointing a gun at
14 them, there is obviously a robbery. Specific intent to kill
15 is what we must show during the course of a robbery or a
16 kidnapping.

17 Now, when you're looking at the Court's charge,
18 ladies and gentlemen, there is something that's called the
19 application paragraphs. And they start on page 13, and it
20 starts with capital murder. That is the first offense you
21 are to consider. Only if you do not believe the State has
22 proven it beyond a reasonable doubt do you go to one of the
23 lesser included offenses. The two lesser included offenses
24 that are contained in this Court's charge are murder and
25 manslaughter.

1 Now, even though the State does not believe that it
2 is murder or manslaughter, we believe we have proven the case
3 to you beyond a reasonable doubt, that the defendant did
4 intentionally take Miss Cunningham's life during the
5 commission of a robbery or kidnapping.

6 I want to talk about the lesser includeds for a
7 minute. For murder, it is the second application paragraph,
8 and it's at the bottom of page 13. It's now if you find and
9 believe from the evidence beyond a reasonable doubt that the
10 defendant, Jedidiah Isaac Murphy, on or about the -- on or
11 about October 4th, 2000, intentionally or knowingly caused
12 the death of Bertie Cunningham, an individual, by shooting
13 the said deceased with a firearm, a deadly weapon, you find
14 the defendant guilty of murder as included in the indictment,
15 or if you find and believe from the evidence beyond a
16 reasonable doubt that the defendant, Jedidiah Isaac Murphy,
17 on or about the 4th -- October 4th, 2000, committed or
18 attempted to commit a felony robbery and/or kidnapping and in
19 the course of and in furtherance of the commission or
20 attempted to commit robbery or kidnapping to Bertie
21 Cunningham, Jedidiah Isaac Murphy committed an act clearly
22 dangerous to human life by shooting the said Bertie
23 Cunningham in the head with a firearm, a deadly weapon, and
24 thereby caused the death of Bertie Cunningham, an individual,
25 you will find the defendant guilty of murder.

1 Why is it not murder? Well, capital murder is
2 murder plus. But when you're looking at this felony murder,
3 you're saying that he intended to cause the kidnapping or the
4 robbery, and he committed an act clearly dangerous to human
5 life by shooting her in the head.

6 Well, ladies and gentlemen, I would submit to you
7 that's not just an act clearly dangerous to human life. You
8 don't put the gun up against someone's head and pull the
9 trigger unless you intend to take their life. Also, it says
10 manslaughter, if you find --

11 THE COURT: Per your request, counsel, 12
12 minutes.

13 MS. MILLER: -- and believe from the evidence
14 beyond a reasonable doubt that Jedidiah Isaac Murphy on or
15 about 4th day of October 2000 recklessly caused the death of
16 Bertie Cunningham by shooting her in the head with a firearm,
17 a deadly weapon, you'll find the defendant guilty of
18 manslaughter.

19 Ladies and gentlemen, there is nothing reckless
20 again about putting a gun to an 80-year-old woman's head as
21 she is laying in the trunk of her car, pulling the trigger.
22 There is nothing reckless about that. The definition of
23 reckless is contained within the Court's charge on page 5.
24 When he is aware of but consciously disregards a substantial
25 and unjustifiable risk that the circumstances exist or the

1 result will occur. Well, ladies and gentlemen, you cannot
2 say that it is reckless when you place the gun against her
3 head.

4 Ladies and gentlemen, beyond a reasonable doubt,
5 even though we said on voir dire it's the highest burden of
6 proof, it is not an insurmountable one. And I would submit
7 to you that we have proven our case beyond a reasonable
8 doubt. We did in fact prove that it was Jedidiah Isaac
9 Murphy, that it was on October 4th of 2000, that it was
10 Bertie Cunningham that he put the cold, hard steel end of
11 that gun to her forehead as he forced her into the trunk of
12 that car, that he pulled the trigger, that it was a firearm,
13 it was a deadly weapon, and it was during the commission of a
14 robbery and a kidnapping. That is exactly what the evidence
15 shows. There was absolutely no mistake about it.

16 And the physical evidence, ladies and gentlemen,
17 shows it. You heard from the medical examiner. Loose
18 contact wound. There is nothing accidental about it. There
19 is nothing reckless about it. This man set out to take her
20 life, and that is exactly what he did. His greed is what
21 caused this. His greed is what took her from her family.

22 Ladies and gentlemen, the State has proven this to
23 you not beyond a reasonable doubt, but beyond all possible
24 doubt. When you sign that first verdict form, we, the jury,
25 find the defendant guilty of capital murder, you're not

1 telling the defendant anything that he doesn't already know,
2 and you will be following your oath to a true verdict render
3 according to the law and the evidence.

4 THE COURT: Mr. Byck.

5 (Argument By Mr. Byck)

6 MR. BYCK: Thank you, Your Honor. May it
7 please the Court.

8 Mr. Davis, Ms. Miller.

9 Ms. Little, Ms. Balido.

10 Ladies and gentlemen of the jury, this is some tough
11 duty, folks. This hasn't been easy. It hasn't been easy for
12 us, and I know it hasn't been easy for you. I'm going to
13 talk to you for a couple of minutes, just probably because it
14 would make me feel a little bit better about the whole
15 thing.

16 Bertie Cunningham is dead. There is nothing we can
17 do about that. You have a job though. You have a job to
18 make some very, very, very critical decisions. And it has
19 not been made easy on you. It has not been made easy at all.

20 Did Jim Murphy shoot Ms. Cunningham? Of course, he
21 did. There is no doubt about that. And if it was that
22 simple, you'd be gone and we'd be out of here. But it's not
23 that simple. Did the act happen? Yes. Well, ladies and
24 gentlemen, you've got to determine what was in a young man's
25 mind. What was in his mind back on October the 4th when this

1 happened? What was in his mind when he had been drinking.
2 Falling down sloshing stupid drunk? No. He had been
3 drinking. What was in his heart when he transferred the gun
4 from one hand to the other? Is the hand paralyzed? Is the
5 hand crippled? Is the hand useless? No. But it is
6 impaired. There's no doubt about that. That's why Dr.
7 Vandiver operated on it is because it was impaired. That's
8 why he was offered light duty because it was impaired. Those
9 are hard questions. Those are questions that we're going to
10 ask you to look at these witnesses because you're the judges
11 of the credibility. You're the judges of the believability.
12 You have to do that, and it's going to be hard.

13 A lot of the witnesses came down here, and they were
14 just as cash register honest with you as they could be. But
15 don't think that your emotions aren't at stake here, ladies
16 and gentlemen, and don't think there wasn't a vampire out
17 there that wanted to prey on you, because there was. And
18 this is what really, really bothers me. It's hard enough for
19 Ms. Cunningham's family to go through this horror, to see
20 these pictures, to not have their sister or their mother or
21 their friend. That's hard enough. But it is absolutely, I
22 submit to you, shameful and detestable for a scientist, a
23 doctor to come down here and add gunpowder to a funeral pyre
24 and say to you, well, it's possible, it's possible that she
25 survived, that she was conscious, that she lived and

1 understood what was going on in the back of that trunk.
2 That's detestable, Dr. Duval, and you should be ashamed of
3 yourself. There was no scientific basis to say that. Dr.
4 Duval said it's possible she could have very well drowned in
5 water.

6 Well, Mr. Davis, the Chief Prosecutor in this case,
7 is not a vampire. Mr. Davis withdrew that. It is not in
8 your charge. It is in the indictment because Dr. Duval wrote
9 that report. But it's not in your charge because it is
10 unsupportable. But Dr. Duval wasn't content with that.

11 THE COURT: Five minutes, Counsel.

12 MR. BYCK: Thank you, Your Honor.

13 She wanted to go one step further. She wanted to
14 inflict on you this delusional horror of hers, that Ms.
15 Cunningham survived and that she was conscious. And I want
16 to say to the family of Ms. Cunningham, I'm so sorry for what
17 happened to her. I am so sorry that that beautiful woman is
18 not with us, but I am even sorrier that you had that burden
19 put on you by that horrible woman who to inflame the minds of
20 these people left you with that cruelest, cruelest of
21 speculations. I'm sorry.

22 Ms. Balido will finish up. I have nothing further
23 to say to you.

24 (Mr. Byck Leaves Courtroom)

25 THE COURT: Defense may continue.

1 (Argument By Ms. Balido)

2 MS. BALIDO: May it please the Court.

3 Ladies and gentlemen of the jury, an old trial
4 lawyer once told me if you resort to arguing the charge,
5 you're kind of out of luck, but in this case it's an 18-page
6 document that you're going to have to sort through. It's
7 important enough that the State spent most of its time on the
8 opening argument directing you to certain portions. I'm
9 going to do that a little bit, too.

10 Let's talk about the jury charge and the type of
11 case this is. This case is not one of those cases that
12 you're going to go back into the deliberation room and sit
13 down and say, well, did he do it. It's not one of those
14 cases. Because as Mr. Byck told you, if that was one of
15 those cases, then we wouldn't be here. The question that you
16 need to go back there and the harder question to ask is what
17 has the State proven to you in this case. What has the State
18 brought to you, because it's the State's burden of proof in
19 this case to show you, to prove to you beyond a reasonable
20 doubt that he's guilty of capital murder and no other crime.
21 That's their burden, and their burden alone. Okay. And
22 they've got to prove to you that they're -- that he's guilty
23 of capital murder by beyond a reasonable doubt. That's the
24 burden of proof that they must show to you. And you've --
25 you can see my jury instructions. And I want to read to you

1 what reasonable doubt is. What the Judge has instructed you
2 what reasonable doubt is.

3 Reasonable doubt is a doubt based on reason and
4 common sense, after a careful and impartial consideration of
5 all the evidence in the case. It's the kind of doubt that
6 would make reasonable -- a reasonable person hesitate to act
7 in the most important of their own affairs. Hesitate to act.
8 Proof beyond a reasonable doubt therefore must be proof of
9 such a convincing character that you would be willing to rely
10 upon it without hesitation in the most important of your own
11 affairs. In the event that you have a reasonable doubt as to
12 the defendant's guilt after considering all the evidence
13 before you and these instructions, you will acquit him and
14 say by your verdict not guilty. That's the final instruction
15 that you have.

16 But how it works is this. You've got to go back
17 there and look at the jury charge. And I submit to you that
18 it's going to take a long time to do this. You look at
19 capital murder. Okay. You look at everything that applies
20 to capital murder. Specific intent to kill being number one.
21 Then you set out murder and you set out -- you set out
22 manslaughter in the same way, because the parts -- they're
23 all -- all the instructions are all jumbled up in there. You
24 need to see which instructions apply to which part of the
25 jury charge. And you look and you see whether or not the

1 State has proven beyond a reasonable doubt that Jedidiah
2 Isaac Murphy had the specific intent to kill at the time of
3 Ms. Cunningham's death. Did they prove that beyond a
4 reasonable doubt? If they don't, we get to murder and those
5 instructions. If they don't prove that, you get the
6 manslaughter. And see if they -- and see if they prove that.

7 Now, the burden never shifts to the defendant. It
8 never does. It's the State's burden and the State's burden
9 alone. The first thing they've got to prove to you is that
10 it happened in Dallas County, Texas. I'm going to get to
11 that in a moment. And as Ms. Miller instructed you, and
12 although we talked about if they don't prove Dallas County,
13 Texas, can you let him walk out of the courtroom, you know,
14 at that time. That's what we talked about each of you --
15 with each of you on voir dire. It's a preponderance of the
16 evidence. They must prove venue by a preponderance of the
17 evidence. But they've got to prove beyond a reasonable
18 doubt -- well, let me get back to venue just one second.

19 What the situation is not is proving that it could
20 be -- you know, it's not anyplace else so it is Dallas
21 County. You see how that's kind of the backwards getting in
22 there? They've got to prove that to you by a preponderance
23 of the evidence. It's not up to the defense to prove that it
24 was not Dallas County, Texas. Okay. Because we don't have a
25 burden in this case.

1 They must also prove to you beyond a reasonable
2 doubt that a voluntary either oral confession or written
3 confession was made in this case. It's not up to us as the
4 defense to prove to you that it was involuntary. They've got
5 to prove to you though their witnesses, through people like
6 Gary Rose and M.J. Myers, that these confessions were
7 voluntary. The State must eliminate every reasonable doubt
8 from your mind by the proof and by the evidence that the
9 statements were voluntary in this case.

10 And finally, they must prove beyond a reasonable
11 doubt that Mr. Murphy intentionally caused the death of Ms.
12 Cunningham, that she (sic) had the specific intent to kill.
13 And it's not our burden as the State (sic) to prove that it
14 was anything but the specific intent to kill. Okay. It's
15 not the defendant's burden. They must prove that to you
16 beyond a reasonable doubt. They must eliminate every doubt
17 from your mind as to what Mr. Murphy's intent was at the time
18 of the death of Ms. Cunningham.

19 And as the jury charge tells you, if you have a
20 reasonable doubt whether or not it's capital murder, murder,
21 or manslaughter, you have to resolve that in the favor of the
22 defendant because you have a reasonable doubt. Okay.

23 Let's look a little bit about this venue situation.
24 For it not to be very important, the State certainly did
25 spend a lot of time talking about it. Okay. First thing is

1 I want to refer you to State's Exhibit Number 3. Okay.
2 There's a lot of things on State's Exhibit Number 3 that a
3 lot of witnesses put on there. I tell you one thing that's
4 not on there is the Dallas County-Collin County line. Okay.
5 There's a lot of things of all these different activities
6 that happened, but what's not on here is where she was killed
7 or the shots were fired or where she was abducted. Okay.
8 And they can lie behind the law and ask you to find venue
9 because he resides in this county and that's fine. They can
10 do that if they want to. Okay. Because they know that they
11 need to in this case basically.

12 And when that becomes important is Detective Myers'
13 testimony. Okay. He first talked to -- he first talked to
14 Jim about what happened out there. Jim told him so they
15 got -- got in the car. And they drove up all over the place,
16 northeast Dallas County, Texas, driving through Richardson,
17 driving through Garland. And remember what they said, that
18 they even -- they even drove past Bleachers, kind of coming
19 up the back side to see whether or not Jim would notice or
20 not they passed Bleachers and did he. Okay. You heard how
21 they -- how he testified they started up north and came down.
22 Okay. Don't you think they might have figured out something
23 if they had started south and gone north and kept on going
24 until they found something? Don't you know if they went
25 outside of Dallas County, Texas, and drove on the major

1 intersections outside Dallas County, Texas, that maybe there
2 would have been a spark? Okay. That's something they have
3 to prove. They have to prove venue in this case.

4 It's such an important situation that Detective
5 Myers got his statement, trying to narrow him down from the
6 defendant. Did this happened in Dallas County, State of
7 Texas? After he made a statement. He went back a second
8 time. Detective Myers, why did you go back a second time to
9 go talk to him about this case? Well, I went back to go
10 figure out if this happened in Dallas County, Texas. Was he
11 cooperative? Yes. Did he tell you? Yes. Did he tell you
12 as much as he knew? Yes. Detective Myers went back a third
13 time. Detective Myers, why did you go back a third time?
14 Well, I needed to figure out where this occurred. I didn't
15 know where it occurred. I didn't know if it happened in
16 Dallas County, Texas. It's big enough concern for him that
17 he went back even a fourth time. Detective Myers, after you
18 went back a fourth time, is there any additional information
19 that you can share with us as to where this murder took
20 place, where the death of Ms. Cunningham took place, where
21 the shots were fired, where she was taken, anything about
22 that? No, there's no additional information. That's how you
23 know how important it is. Like I say, if they want to rely
24 on those general portions of the law, that's fine. Then you
25 can find him guilty and find venue because of that. But I'm

1 telling you, it's just not there.

2 There seems to be a theme with the State's case.
3 Basically, well, if there's no indication that it's not
4 Dallas County, then it must be. Same goes along with the
5 confession and the written -- the oral statements and the
6 warnings that Gary Rose supposedly gave Mr. Cunningham
7 (sic). Well, you know, Deputy Rose, after you came down from
8 the Dairy Queen and, you know, everybody all rounded up over
9 there and y'all got in there, did you read him his rights?
10 Well, yeah, I did. Did he ever indicate to you that he was
11 waiving those rights? No. Did he ever -- but he didn't give
12 me any indication that he wasn't waiving those rights. Okay.
13 Is that proof beyond a reasonable doubt? I don't think so.
14 They've got to prove beyond a reasonable doubt that he waived
15 those rights.

16 So let's look at and make the State prove to you
17 beyond a reasonable doubt were the warnings given, number
18 one, and did he voluntarily assent and give up those rights,
19 even though there was no indication to Gary Rose that he
20 didn't. Okay. And things you can consider are what? I hate
21 to vouch for what Shod was saying because I guess y'all could
22 tell that I didn't like Shod very much, didn't believe him,
23 but the kind of drinking and the drug taking that was going
24 on. Well, let's say for a moment that you believe that he
25 understood his rights, that those rights were given, and that

1 he took away those rights, that he -- that he -- that he
2 waived those rights and decided to make a statement? He
3 makes a statement to Jason Bonham, and basically the
4 statement to Jason Bonham -- and let's go forward a little
5 bit -- a little bit farther also and talk about the written
6 statement that he gave to Detective Myers, if you find that
7 he waived those rights as well.

8 Those things -- those statements are consistent.
9 Okay. The State wants you to believe only the part of the
10 statement of the defendant, what fits into their case. They
11 only want you to look at what part of the statement deals
12 with Dallas County, Texas. That helps them kind of get
13 through their venue problem. They only want you to believe
14 the part of the statement where it says that he actually
15 killed Bertie Cunningham because that proves cause of death.
16 Okay? But what they don't want you to believe and what they
17 spent a whole day doing is trying to prove that Jedidiah
18 Isaac Murphy is a liar when he made his statement. Okay?
19 Basically his statement from the beginning, from the middle,
20 and from the end is that it was an accident. Okay. It
21 wasn't his intent to shoot her. You need to look at his
22 statement in the case and read through it and see what is
23 proved and what is not proved.

24 I told her I needed a ride to 635 and she agreed to
25 take me as long as she was safe and I assured her that I

1 wasn't out to hurt anyone and we drove off. Okay. That
2 shows proof that -- that he's telling the truth, that it was
3 an accident. It goes along with the theory of accident.
4 It's an involuntary thing that happened. I told her that I
5 was going to put her in the trunk and go to the pay phone and
6 call the police, and after I got far enough away, they
7 could -- they could get her out safely after. Okay.

8 Now, the act of actually putting somebody in a trunk
9 is bad in and of itself. Okay. And it's something that is
10 outside the norm of what law-abiding people do. I don't --
11 I'm not trying -- I'm not trying to say that. What I'm
12 saying is that in and of itself does not mean that he
13 intended to cause the death of Ms. Cunningham. Okay. He
14 explains what happened. I switched hands because I can't
15 feel my left hand. It's a habit for me to use my right hand
16 to open and close doors. When I reached for the trunk and I
17 still had the gun with my left hand and I grabbed it too hard
18 and it shot. Okay. Now, you come to the -- you come to this
19 part of the statement and you read it and you go, well, guns
20 don't just go off. Okay. That's -- you know, but listen to
21 what he's saying. Okay. And listen to what the evidence
22 is. He has been drinking. Is he fully intoxicated? No. He
23 has this injury to his hand. Okay. Does it make it totally,
24 you know, debilitating that he can't use his hand? No.
25 Could it lead to an accidental shooting? I'd submit to you

1 that it could.

2 And then he talks about exactly what happened and
3 opening the trunk and he pulled it too hard and then we get
4 to the testimony of Mr. Hueske that was simply called in here
5 to explain, yes, guns sometimes go off and here's why. Okay.
6 Because that's the biggest problem in the confession is how
7 could this gun go off. And you heard about this sympathetic
8 muscle movement, that if you're moving with one hand,
9 sometimes the other hand pulls as well, and sometimes it can
10 be enough trouble to someone that the gun actually goes off.
11 Such a sympathetic movement. This one is moving at a hundred
12 percent and there's a sympathetic movement and some
13 percentage on -- on the left hand and the gun goes off.
14 Okay. It's such a problem that police officers are trained
15 not to go walking around with your finger on the trigger
16 going into somebody's house because a gun might go off.
17 Police officers are trained in their training exercises that
18 they've got to take their finger off the trigger, put the gun
19 in there before they start trying to maneuver anything with
20 your other hand because there's such a danger that this sort
21 of thing can happen. And what that is, is it's not the
22 specific intent to kill. Okay. That's what it is not.

23 Now, Mr. Davis and the State is going to, I'm sure,
24 go talk about going over the sister's and how this
25 self-serving testimony about wanting to kill himself and

1 everything, over in the -- in the garage of his sister and
2 how that's probably not true and it's just self-serving. I
3 want you to look at State's Exhibit Number 38 and look at
4 this hose and see if you can find a hole where it is burned
5 out perhaps by something hot it's not used to, but was used
6 in a way that is different than it was made to be used.
7 Again, things that are consistent, things that are proven by
8 the evidence that the State has shown you to show that the
9 defendant is trying to tell the truth as best he knows it in
10 his statement.

11 And finally, the last statement to all the people
12 destroyed by this, it was not intentional and I'm sure that
13 you wish me dead and I would wish the same. I'm cooperating
14 so you understand that I'm not trying to hide what happened,
15 and the fact that I am not an evil person who hurts people.
16 Not intentional, not trying to hide from what he did, just
17 trying to explain how this horrible, horrible tragedy
18 happened. That's what his confession says.

19 Again, what the State has to prove to you to get to
20 capital murder is the specific intent to kill. Okay. And
21 the State must prove to you that he intentionally caused the
22 death of Miss Bertie Cunningham, that it was his conscious
23 objective and desire to first engage in the conduct and then
24 cause the result. That's the type of proof that they must
25 prove to you beyond a reasonable doubt before you can find

1 him guilty of capital murder.

2 And what the defense does not have to prove to you,
3 that it was an accident. They have to prove that it wasn't
4 an accident, that it was intentional, that he had the
5 specific --

6 THE COURT: Five minutes remain.

7 MS. BALIDO: -- intent to kill.

8 Thank you, Judge.

9 The defense does not have to prove to you that it
10 was not an involuntary act. They must prove to you -- the
11 State must prove to you beyond a reasonable doubt that it was
12 intentional. The State must eliminate all reasonable doubt
13 from your mind before you can find him guilty of capital
14 murder. And I'm not going to tell you which one, either
15 murder or manslaughter, I think it is. That's up for you to
16 decide. But what they want you to do is they want you to
17 look at all the evidence in this case separately. Well, he
18 wasn't intoxicated so he must have intended to kill Ms.
19 Cunningham, specifically intended. Well, you know, that hand
20 thing, you know, he's trying to make it bigger than it is, so
21 he -- so he had to have intended and had the specific intent
22 to kill Ms. Cunningham. And this unintentional discharge
23 situation, just kind of throw that out the window. And I'm
24 saying look at it all as a whole. Look at all the facts in
25 the case and see whether or not they've proven their case

1 beyond a reasonable doubt.

2 And ask yourself, does a close contact wound
3 necessarily disprove accident in this case. Considering, you
4 know, what the evidence is in this case and how the shots
5 occurred, does close contact necessarily disprove accident?
6 Does his actions after the fact necessarily disprove that
7 this was not an accident, that he had the specific intent to
8 kill? Or can you see that it is a person that is -- that has
9 performed a tragic accident, committed a tragic accident, the
10 death that results in the death of a human person, of a human
11 being, and then is just basically and truthfully freaked out
12 about it and is going around and leap taking and trying to
13 get all his -- say good-bye to all his friends and his family
14 before he ends his life like he says in this confession.

15 In conclusion, ladies and gentlemen, if it -- if his
16 intent was reckless, then it's manslaughter. If it's
17 knowing, that he knowingly committed this murder, it's
18 murder. Only until the State proves to you that he had the
19 specific intent to kill Ms. Cunningham does it get to capital
20 murder. And again, any doubt that you have goes to benefit
21 the defendant. Read all the parts of the charge.

22 If you throw out the confessions, look at the
23 evidence what's left and see what it tells you. If you keep
24 the confession in, look at all the evidence and see how it
25 proves up the defendant's statements and what happened.

1 And finally venue, did they prove Dallas County
2 Texas? Because that's the one you're going to have to let
3 him go on, and that would be the hardest question and the
4 hardest thing that you'd ever have to do if that's the
5 decision you come to in this case. Because if you're -- if
6 you come back with manslaughter, if you come back with
7 murder, if you come back with capital murder, you're not
8 alleving Jedidiah Isaac Murphy of any responsibility for what
9 he did. You are making him responsible for what he did.
10 You're making him accountable on all three of those things.
11 You are just applying the law to the facts. Okay. But if
12 you look at venue and you believe that they haven't proved
13 venue to you, then you've got to let him go. If they haven't
14 proved it by a preponderance of the evidence. And you think
15 it's not important and you think it's not -- not critical in
16 this case, I want you to look at two things that the State
17 put into evidence before you. The first the map, Defense
18 Exhibit Number 2 -- I mean -- excuse me, State's Exhibit
19 Number 3, and the pictures. And notice the size of them.
20 The map is small. The pictures are big. What do you think
21 the State wants you to key in on?

22 THE COURT: Mr. Davis, the State may conclude.

23 MR. DAVIS: May it please the Court.

24 THE COURT: 15 minutes.

25 (Argument By Mr. Davis)

1 MR. DAVIS: Thank you, Judge.

2 Ladies and gentlemen, first of all, on behalf of the
3 State of Texas, I want to thank you in this case, not for
4 coming down here, not for being a part of this jury because
5 we all know that really that -- you didn't have a choice
6 about that. What I do want to thank you for though is the
7 very close consideration that you've given to the facts in
8 this case because it's upon those facts that you'll be basing
9 your verdict in this particular case. That's what we
10 explained to you on voir dire, that your duty would be to
11 render a true verdict according to the law given to you by
12 the Judge and the evidence presented in this case. So those
13 facts are very, very important because those are the facts
14 that show very clearly that this individual right down here,
15 Jedidiah Isaac Murphy, on October the 4th of the year 2000,
16 intentionally murdered Ms. Bertie Cunningham during the
17 commission of both a robbery and a kidnapping. That's what
18 we're talking about in this case.

19 Now, let me just take a couple of moments if I could
20 and talk to you briefly about what Mr. Byck said to you
21 before he left. He made a statement, and inasmuch as I
22 respect him, I have to disagree with him very, very much with
23 this particular statement. Because he said as we sit here
24 right now, there is nothing that we can do about the death of
25 Bertie Cunningham. And I've got to disagree very vigorously

1 on that point. Because you have a choice right now as you
2 sit in this jury box. Your choice is this: You can turn a
3 blind eye to all the facts and the evidence that you've heard
4 in this case and take all responsibility away from this
5 cold-blooded killer. Or you can follow the law and the
6 evidence and do justice. That's all that we can do for
7 Bertie Cunningham. But it's your job in this particular case
8 to do justice. That's the job of this jury.

9 He also said to you, and frankly I didn't understand
10 this. Perhaps you did. About the vilification of Dr.
11 Duval. That, to me, I didn't quite understand. Perhaps you
12 did. About her being some sort of detestable vampire, that
13 somehow we're supposed to heap all this anger and hatred
14 toward her because she came down here and as a medical doctor
15 told you because of the location of the body, circumstances
16 of where Ms. Cunningham was found, that she can't entirely
17 rule out drowning. I suppose that if she's a detestable
18 vampire, then the defense's own expert, Dr. Peerwani, has to
19 be one, too. Because you recall as he testified during the
20 defense's case, he said that there were no objective positive
21 findings for drowning, but there are cases in which there
22 aren't any positive findings. And with regard to Ms.
23 Cunningham surviving for a period of time, you'll recall his
24 testimony being that exactly of Dr. Duval in that case, that
25 in these types of cases where the brain stem has not been

1 affected, where those functions of the brain that directly
2 affect the life functions have not been damaged, it is indeed
3 very possible. There are documented cases of individuals,
4 such as Ms. Cunningham, surviving for a period of time. And
5 as Dr. Peerwani himself said, that could range up to a few
6 hours in a case such as this. So let's forget all that,
7 let's forget the diversions. Let's get down to what really
8 matters in this case.

9 Has the State of Texas proven its case beyond a
10 reasonable doubt as to the elements, and first, have we
11 proved venue beyond a preponderance of the evidence? Have we
12 reached that 51 percent mark on venue? Because as you recall
13 on voir dire, this is the lowest standard allowable in the
14 criminal justice system, preponderance of the evidence. That
15 we tip those scales ever so slightly one way or another, 51
16 to 49. Very clearly, we have. Very clearly, we've gone
17 beyond that in this particular case.

18 I've never considered proving an indictment to a
19 jury --

20 MS. BALIDO: Judge, I'm going to object to the
21 personal statements of the --

22 THE COURT: Sustained.

23 MS. BALIDO: -- prosecutor. Ask the jury
24 disregard.

25 THE COURT: The jury will disregard the last

1 comment of the prosecutor and consider it for no purpose.

2 MR. DAVIS: Ladies and gentlemen, proving an
3 indictment to the jury, I would submit to you, is not hiding
4 behind the law. That's what the State of Texas has done in
5 this case. We've proven venue. And as Ms. Miller has gone
6 over in great detail, and I'm not going to spend a lot of
7 time here, we've done that in multiple fashion here. We've
8 done it because by the evidence presented by the statement of
9 the defendant himself, through the testimony of Detective
10 Myers, a reasonable deduction in this case. This abduction
11 and murder occurred in the City of Garland somewhere south of
12 Bleachers, but before you get to LBJ Freeway. And, ladies
13 and gentlemen, that entire area is in Dallas County, Texas.
14 The use of the property is very clearly been shown to have
15 been in Dallas County, Texas, at multiple locations. The
16 injuries being received in Dallas County, Texas. Again, you
17 look to the evidence, the blood evidence there on Portsmouth
18 where Zach and his mother lived, Dallas County, Texas. I
19 mean very, very clearly venue has been shown. So let's go
20 now to the next step.

21 Let's look at what's really in dispute in this case
22 and what's not in dispute. Perhaps you sat there in the jury
23 box and kept waiting for one of these attorneys to address
24 the issues of robbery and kidnapping. Complete silence on
25 those points. Because why? Because they're really can be no

1 dispute, can there? That this defendant robbed Ms.
2 Cunningham and kidnapped Ms. Cunningham. There's no real
3 question, there's no real dispute about that. That's been
4 proven in this case. The only real dispute for you to
5 consider at this time is this: Did Jedidiah Isaac Murphy
6 intentionally shoot and kill Ms. Cunningham, or as the
7 defense claims did he accidentally cause the death somehow of
8 Ms. Cunningham? And what I want to do for you the next few
9 minutes is this: Let's go through all the evidence. We're
10 not going to look at it in isolation. That's not the way you
11 do things down here. You look at things in its entirety. I
12 want to go through a few things with you, both before the
13 shooting, during the shooting, and then finally after the
14 shooting. Then you determine are these facts that are
15 indicative of an accident or do they show an intentional
16 pattern of behavior on the part of Jedidiah Isaac Murphy?

17 Let's look first of all, what evidence do we have
18 that this is an accident? Really you just have the words of
19 this person down here, when he says to Detective Myers, the
20 gun just discharged and it was an accident and I didn't mean
21 to kill that woman. That's really the only evidence that you
22 have here is his word for it. That he just didn't mean to do
23 it. And curious, isn't it, that the very first time that he
24 mentions anything about an accident is after he's already
25 been placed under arrest, he knows he's going to be charged

1 with capital murder, and he's possibly facing the death
2 penalty. Because there is absolutely no evidence before you
3 that this person went to any other individual before he got
4 caught down there in his hiding place and said, hey, Shod, I
5 need to tell you something. Man, there's been a terrible
6 accident here. Or, hey, sister, you know, I just didn't mean
7 to do it. It's just a horrible misunderstanding here. There
8 is none of that, is there? First time we hear that
9 self-serving statement out of this man's mouth is when he
10 knows what he's facing, that some day he's going to have to
11 face a jury like you individuals right over here and the
12 State of Texas may seek his life in a death penalty case.
13 That's the evidence.

14 So what else do we look at? Well, let's look at all
15 the intentional actions that this person had to take to get
16 him to that point. He had to intentionally decide at his
17 Mother -- at his sister's house that day that he was going to
18 take possession of a .22 caliber pistol and leave her home
19 with it. That gun didn't jump into his hand or his pocket,
20 did it? That's a conscious decision that Jedidiah Murphy
21 made on the morning of October the 4th. And he decided again
22 intentionally that he would take that gun from that
23 residence, wherever he went that day. The next intentional
24 decision was to abduct Ms. Cunningham. That did not happen
25 by accident. He simply didn't jump into her car as she drove

1 home from Collin Creek Mall, did he? He had to do
2 something. We'll never know what, but he had to do something
3 to actually lure her into a position where he could take
4 control of her and commandeer her vehicle. And that's
5 exactly what he made a decision to do that day.

6 How did she get in the trunk? Did she jump in there
7 on her own? Absolutely not. The next intentional decision
8 is this: To force that 80-year-old woman out of her car,
9 into her trunk, and then to intentionally decide to place
10 that gun into his hand, to hold that gun on this 80-year-old
11 woman as she is laying in that trunk, to intentionally decide
12 to take your finger and place it inside that trigger guard,
13 to intentionally place it on the trigger itself. All of
14 those are intentional acts. For what purpose? To take the
15 life of Ms. Cunningham so there will be absolutely no witness
16 who can testify that he had abducted and robbed her that day.
17 And make no mistake about it, that was his motive because we
18 all know he had not even enough money at Bleachers bar to pay
19 for that second drink. From his bank statements you know his
20 worker's comp checks had cut off two days earlier. He's got
21 absolutely no money in the bank whatsoever. And the motive
22 is very clear when he left that morning. He's going to get
23 some money wherever he has to find it, from whomever he has
24 to take it from. That's his motive that day. And when he
25 shot that woman in the head and when he shot her at point

1 blank range, I will submit to you that that is a very clear
2 indication of what his intent was at that time.

3 Now, we don't have to stop right there, though,
4 because we have the benefit -- we have the benefit of seeing
5 what he does afterwards. And again, as we go through there,
6 you ask yourself this: Is this the actions of an innocent
7 man who has now accidentally taken the life of an 80-year-old
8 woman or not? What's the very first thing that we know this
9 man does following the murder of Ms. Bertie Cunningham? Does
10 he call 911 to say, I've got a shooting victim here, send
11 someone, send an ambulance, send someone to help save her
12 life? Does he flag down a motorist? Does he leave her at
13 some spot so she can get the necessary medical care for this
14 supposed accidental shooting? No. See, his mind works
15 differently. His motives are not ours. His motive was to
16 get money, so the very first thing -- imagine this, imagine
17 this, that her body in the trunk, perhaps still living, he
18 goes over to the Richardson ATM at Washington Mutual, takes
19 that credit card and plugs it in the machine trying to steal
20 her money. Is that the act of an innocent man?

21 What's the next thing that we know? He's out there
22 now showing this car off to these kids, bragging, hey, look
23 what my girlfriend got me, look at the cards, hey, let's go
24 out and have a good time, let's do some shopping, man, I'm
25 ready to do some shopping. Is that what an innocent man

1 does? There a woman lies dying or dead in the trunk.

2 The next step, Harry Hines, same old routine. ATM
3 machine, 11:30 at night, 4:30 in the morning. The acts of an
4 innocent person?

5 Next place he shows up is in Edgewood, Texas, over
6 there -- his old buddy Shod's house. This is after the kids
7 have already told you when this guy is with them, it's just
8 the same old Jim like he doesn't have a care in the world.
9 Not one thought being given to Ms. Bertie Cunningham by this
10 individual right over here. That's exactly what Shod tells
11 you, too. Hey, it's the same old Jim, come down to visit,
12 let's have some good times and it's the same old spending
13 spree again. If you had any doubt whatsoever about this
14 man's mind-set, I would invite you in that jury room to ask
15 for a VCR and watch that tape in Chacho's liquor store
16 because if you ever want some real insight into a
17 cold-blooded killer's mind and what really makes him tick and
18 how much disregard he has for human life, you take a look at
19 him as he jokes and kids around in Chacho's, the exaggerated
20 gestures and the fun he seems to be having taking the credit
21 card of Bertie Cunningham and giving it to the clerk there
22 for use in that liquor store. That really tells you all you
23 need to know.

24 THE COURT: Two minutes remain.

25 MR. DAVIS: To add insult to injury, what does

1 he do with the body, this person who's supposedly
2 accidentally murdered Ms. Cunningham? Well, he very
3 unceremoniously takes it down to the place where he knew so
4 well in high school, you know, his old party down there on
5 Livingston Hill, the place where they routinely dump trash.
6 Took the body, wrapped it up, and then dumped it in the creek
7 just like another piece of garbage. That's the regard he has
8 for the human life of Bertie Cunningham. And when you look
9 at the totality of all the actions again, I ask you this, are
10 these the acts of an innocent person who's accidentally taken
11 a life? Clearly they are not. They're the actions of this
12 person right here, because you see, he's not an innocent man,
13 is he? He's a cold-blooded killer, who made a conscious,
14 intentional decision that day to take Ms. Bertie Cunningham
15 into his control, to stuff her into a trunk, to kill her, and
16 then to try to reap the benefits of his horrible actions.
17 You know, the truth sometimes is not pretty, and I really
18 regret that you had to look at a lot of this evidence. This
19 is not pleasant to look at, but in order to understand
20 exactly what happened in this case, to more fully understand
21 the individual that we're dealing with, it was necessary that
22 you look at this.

23 And I'm going to ask you now to think back to when
24 we were on jury selection. Each and every one of you made a
25 commitment to us. And that commitment was to render a true

1 verdict according to the law and the evidence. And I asked
2 each and every one of you, if the State of Texas proves its
3 case beyond a reasonable doubt as required by law, not only
4 could you, but would you find the defendant guilty. At this
5 time, ladies and gentlemen, the State of Texas has met its
6 commitment. We have shown this man's guilt beyond any
7 reasonable doubt. I'm going to ask you to find him guilty of
8 capital murder at this time, not because I say that he's
9 guilty, but because again the facts and the evidence
10 presented in this case show beyond any doubt whatsoever that
11 Jedidiah Isaac Murphy on October the 4th of the year 2000,
12 intentionally killed Bertie Cunningham while he was robbing
13 and kidnapping her. Thank you.

14 THE COURT: Ladies and gentlemen, you will
15 retire, I believe lunch is --

16 THE BAILIFF: Should be here soon.

17 THE COURT: -- should be here by now. The
18 alternate is invited to stay with the rest of the jurors
19 through lunch. After -- before they begin their
20 deliberations, you will be excused.

21 Sheriff, if you'd retire the jury.

22 THE BAILIFF: All rise.

23 (Jury excused from courtroom.)

24 THE COURT: Sheriff, may we have the jury,
25 please.

1 Before the jury returns, if there's anybody who
2 feels that they cannot restrain their emotions in an
3 appropriate fashion, I understand. If you feel that way, I
4 would invite your considering excusing yourself from the
5 courtroom. In no way do I wish my comments to be interpreted
6 as my attempt to, quote, unquote, chill anybody's
7 constitutional right to be in the courtroom when the verdict
8 is read.

9 The Court on its own motion, after I have read the
10 verdict, will be polling the jury individually on its own
11 motion.

12 THE BAILIFF: All rise.

13 (Jury returned to courtroom.)

14 THE COURT: Ladies and gentlemen of the jury,
15 you may be seated.

16 Mr. Murphy, counsel, visitors in the gallery, you
17 may be seated as well.

18 Ladies and gentlemen of the jury, the procedure that
19 will be followed next is I will read the verdict form. After
20 I have done so, I will be calling you individually, polling
21 the jury. It's called individually. As I call your name,
22 may I ask that you individually rise upon your name being
23 called. I will then ask you what your individual verdict
24 is. After you have responded to that question, you may be
25 seated. I will go to the next juror until all 12 have been

1 polled.

2 (Verdict of the Jury on Guilt/Innocence)

3 THE COURT: Cause Number F00-02424-M, styled
4 the State of Texas versus Jedidiah Isaac Murphy, verdict
5 reads as follows: We, the jury, find the defendant, Jedidiah
6 Isaac Murphy, guilty of capital murder as charged in the
7 indictment, presiding juror Nichole Marie Briscoe.

8 I will now call the jurors in the manner in which
9 they were interviewed during voir dire, beginning with Juror
10 Number 1, Emilia Nisbet.

11 Ms. Nisbet, what is your individual verdict?

12 JUROR: Guilty of capital murder.

13 THE COURT: Thank you. You may be seated.

14 Juror Number 2, Dorothy Jennings, would you please
15 rise? Ms. Jennings, your individual verdict?

16 JUROR: Guilty of capital murder.

17 THE COURT: You may be seated.

18 Juror Number 3, Kathy S. Hunter. Ms. Hunter, your
19 individual verdict?

20 JUROR: Guilty of capital murder.

21 THE COURT: You may be seated.

22 Juror Number 4, the Presiding Juror, Nichole Marie
23 Briscoe.

24 JUROR: Guilty of capital murder.

25 THE COURT: You may be seated.

1 Juror Number 5, Richard Anthony Bachmeyer. Mr.
2 Bachmeyer, your verdict, sir?

3 JUROR: Guilty of capital murder.

4 THE COURT: You may be seated, sir.

5 Juror Number 6, Robert L. Mendro. Mr. Mendro, sir,
6 your individual verdict?

7 JUROR: Guilty of capital murder.

8 THE COURT: You may be seated, sir.

9 Juror Number 7, Joann Ruby Lawley. Ms. Lawley, your
10 individual verdict?

11 JUROR: Guilty of capital murder.

12 THE COURT: You may be seated.

13 Juror Number 8, Andre Garza. Mr. Garza, your
14 verdict, sir?

15 JUROR: Guilty of capital murder.

16 THE COURT: You may be seated, sir.

17 Juror Number 9, Marcus Stanley Rasco. Mr. Rasco,
18 your verdict, sir?

19 JUROR: Guilty of capital murder.

20 THE COURT: You may be seated.

21 Juror Number 10, Mark Milford Jones. Mr. Jones,
22 your verdict, sir?

23 JUROR: Guilty capital murder.

24 THE COURT: You may be seated, sir.

25 Juror Number 11, Henry Lee Turner. Mr. Turner, sir,

1 your individual verdict?

2 JUROR: Guilty of capital murder.

3 THE COURT: Mr. Turner, you may be seated.

4 Juror Number 12, Shannon Warner Hinckley. Ms.
5 Hinckley, your verdict, ma'am?

6 JUROR: Guilty of capital murder.

7 THE COURT: You may be seated.

8 The Court accepts the verdict. Ladies and gentlemen
9 of the jury, I'm going to ask that in the company of the
10 bailiff you return to the jury room. We have some scheduling
11 matters that the attorneys have asked that I discuss with
12 you. Going to have the court reporter come in with me. I
13 don't want her presence in any way, shape, or form to be
14 construed by any of you as intimidating, but merely just to
15 memorialize everything that I am saying outside the presence
16 of Mr. Murphy and the attorneys. Going to make some comments
17 to you. I will then be excusing myself so you can discuss
18 with your fellow members some of the alternatives that I'm
19 going to present for your consideration after which if you
20 would again activate the jury call button, I'll come back in
21 if there's further discussion that you need.

22 One of the things we need to be cautious about when
23 I come in and talk with you, the court reporter is but one
24 person and can only take one person talking at a time, so if
25 we could have some sort of order to our discussion for the

1 benefit of the court reporter, please.

2 Sheriff, may I ask that you retire the jury.

3 THE BAILIFF: All rise.

4 (Jury excused to jury room.)

5 THE COURT: Visitors in the gallery, you may
6 be seated.

7 Before I go in and discuss with the jury some
8 scheduling options, one of the things in anticipation that
9 they will be asking me, which obviously would not have been
10 proper for me even to inquire until we reached this stage of
11 the trial, without telling me necessarily the nature of the
12 testimony, how long does the State think that their evidence
13 will take to present in the penalty phase of the trial in
14 light of the verdict?

15 MR. DAVIS: Judge, I anticipate that the State
16 can complete its testimony in one day in this matter.

17 THE COURT: One day?

18 MR. DAVIS: Yes, sir.

19 THE COURT: Ms. Little, lead counsel for the
20 defense, how much time do you anticipate?

21 MS. LITTLE: I would say three days. And
22 given argument about admissibility and things, it could be
23 four.

24 THE COURT: Thank you very much. I will
25 excuse myself a moment and bring this to the attention of the

1 jury.

2 (Recess of proceedings.)

3 THE COURT: This hearing is being conducted in
4 the jury room. Court reporter, court, a bailiff, Ms. Grace
5 Madore, present with the 12 jurors.

6 Before we came in here, I asked the attorneys how
7 long they reasonably anticipated that their evidence from
8 each side would last in the penalty phase of the trial. I
9 did not ask them until there was a verdict in this stage of
10 the trial because, depending upon your verdict of course,
11 their entire strategy with regard to punishment, had it been
12 other than capital murder, would have been vastly changed.
13 Obviously, both sides had prepared for a penalty on a capital
14 murder guilty verdict, but until if, as, and when that
15 occurred, of course, everything was kind of in flux. Now
16 those matters will be set hard and fast.

17 The State says, and I think very frankly they are
18 being unfailingly optimistic with themselves and with me,
19 that they will take but one day with regard to their
20 punishment evidence. We have had a number of pretrial
21 hearings dealing with their presentation of anticipated
22 evidence if we should get to this stage of the trial. Having
23 been at this many, many years, I see no way that given what
24 they are going to be presenting to you on the matter of
25 punishment, they can do it in one day. That's my judicial

1 observation. I'm not the lawyer.

2 The defense, very frankly much of their case has
3 been geared in anticipation of a penalty stage of the trial.
4 That I know because I have signed the orders granting them
5 the opportunity to hire some expert witnesses and I see what
6 their bills have been and they say and I think they're being
7 very realistic, they say, Judge, we're looking from a defense
8 standpoint three days. Okay.

9 Now, our good scouter here, I say that not
10 pejoratively. I'm an Eagle Scout as well, have been to
11 Philmont, and I know just with which you're going there.

12 Mr. Jones, you'll be back the 26th late?

13 MR. JONES: Yes, sir, late sometime that day.

14 THE COURT: Whatever we do is going to
15 inconvenience most of us. That's a given. I understand
16 that. I am going to propose, and I want you to discuss this
17 with your fellow jurors after I leave.

18 MS. BRISCOE: Okay.

19 THE COURT: And let me tell you I am more
20 concerned about the 12 of you here than I am the lawyers.
21 You're my constituents, not they. So it will largely be your
22 call. I'll fade the heat with them. Don't worry about
23 that. I would propose a couple of alternatives for your
24 discussion and consideration. Got a calendar up there.

25 I would propose one of the things we consider is

1 adjourning and resume the penalty phase of this proceeding
2 Wednesday, the 27th of June, and work that Wednesday,
3 Thursday, and Friday. Following week is the 1st of July. Of
4 course, the 4th is a holiday. I would anticipate if were we
5 to do that, we could arguably be completed even if you decide
6 to work on that Saturday -- if you want to work on Saturday,
7 I will, but only if you want to.

8 MR. RASCO: Saturday, the 7th?

9 THE COURT: No, Saturday the 30th. Now, the
10 4th is a holiday. Either that or we could, if you wanted to,
11 not start until like the 2nd of July, let the State put on
12 their evidence on punishment, and as soon as they finish, we
13 not resume until after the 4th. But I'm open for
14 alternatives as well.

15 MR. MENDRO: Judge, I have a problem, because
16 in my original form we have a July vacation scheduled that we
17 set up a year ago.

18 THE COURT: When?

19 MR. MENDRO: It starts -- I could delay the
20 2nd or the 3rd, but I've got to be gone by the 4th.

21 THE COURT: Okay. That's the kind of output I
22 needed.

23 MR. TURNER: I have a vacation scheduled for
24 the week of the 9th, also.

25 THE COURT: What I'm hearing, and I'm going to

1 get out of here because I want you to discuss it without my
2 black robed intimidating presence and I hope it's not that.
3 But if you want to resume on the 27th, or arguably I could
4 force the State into presenting theirs tomorrow, seeing if
5 they could.

6 Mr. Jones, you have to be gone beginning -- you
7 leave, what, 5 o'clock? I mean --

8 MR. JONES: Bus leaves at 5:30 on Wednesday,
9 sir.

10 THE COURT: We could have some State's
11 evidence before -- before Wednesday if you want that. But if
12 you just want to have all of the penalty -- because the type
13 of evidence that will be -- will be presented will be totally
14 unlike the evidence that you heard in the guilt/innocence
15 phase of the trial. It's just like the other side of the
16 coin, so it will be a bunch of different types of stuff that
17 you will hear.

18 MR. RASCO: Are we allowed notes during that?

19 THE COURT: Oh, sure. Oh, yeah.

20 So anymore questions for me? Then I'm going to get
21 out of here. Discuss it with yourselves. I apologize. Any
22 type of situation like this is bad at best, but I want to
23 tell you, I saw this train wreck coming, and I told them --
24 the attorneys before the start of trial, and Ms. Madore will
25 tell you, and it's on the record. I said, Mr. Jones has got

1 this scouting deal. We've got an alternate. I am willing to
2 take a chance and go with these 12 and allow Mr. Jones to be
3 excused, and both sides absolutely went in orbit. They want
4 you 12. Very frankly, I mean they were adamant about it.
5 They said, no, we don't want -- no, these are our 12. And
6 they worked very, very hard, and they want this 12. And they
7 knew the problems, and they knew what I was going to have to
8 come in and talk to you about. They said, no, we don't want
9 any one of the 12, including Mr. Jones, to be excused. So
10 you are the 12 chosen.

11 MS. BRISCOE: Do you think it's realistic then
12 for maybe five days of testimony?

13 THE COURT: Yeah.

14 MS. BRISCOE: Total?

15 THE COURT: But I would -- the State, if the
16 State says -- when Greg Davis puts on a penalty stage, does
17 it very, very quickly, very quickly. This is the third or
18 fourth one of these he's tried before me and probably the
19 third or fourth one that Mr. Byck has.

20 MR. JONES: So the State should be done in how
21 long, do you think, if they're saying one day?

22 THE COURT: I give them a day and a half at
23 the most.

24 MS. BRISCOE: So Tuesday and Wednesday we
25 could be --

1 MR. GARZA: We would be through by Wednesday?

2 MR. JONES: And then we come --

3 THE COURT: Yes.

4 MR. GARZA: Sunday would not be a possibility,
5 just Saturday through Monday?

6 MS. BRISCOE: Two questions. One, if we split
7 it tomorrow and next day and come back the 27th, that's not
8 going to cause any problems in the overall procedure or
9 anything?

10 THE COURT: Not legally, huh-uh.

11 MR. MENDRO: Now, another question, are we
12 going to end up being sequestered during any part of the
13 penalty phase?

14 THE COURT: Not that I anticipate, no. That
15 option is always out there. There will, I anticipate, be a
16 story in tomorrow morning's paper. There has not been. It's
17 been a concerted effort by the Dallas Morning News -- Tim,
18 the reporter that covers this beat and the editor, out of
19 respect for you, have decided that they are not going to run
20 the story on a day-by-day basis. The first day they had it,
21 I've got that for you, won't give it until the trial is all
22 over. There was that first day, but not an article since.
23 Not an article since.

24 But I'm going to get out of here. If you'd activate
25 the jury call button. You're the boss.

1 MR. JONES: Thank you.

2 MS. BRISCOE: Thank you.

3 (Recess.)

4 THE COURT: Madame Presiding Juror, have you
5 had an opportunity to confer with your fellow jurors?

6 MS. BRISCOE: Yes.

7 THE COURT: What is your pleasure?

8 MS. BRISCOE: We would like to begin tomorrow
9 and go until 3 o'clock on Wednesday, resume on the 27th, and
10 we are willing to work on that Saturday, the 30th, if need
11 be.

12 THE COURT: Request granted. See you tomorrow
13 morning 9 o'clock.

14 MS. BRISCOE: Yes, sir.

15 (Return to open court)

16 THE COURT: Let the record reflect I explained
17 to the jurors the alternatives that were possible options
18 with regard to the penalty phase of the trial. They have
19 selected the following option, and I am notifying counsel
20 that this will be the procedure that we will follow the
21 penalty phase of this trial.

22 We will begin tomorrow morning at 9:00 a.m., with
23 the presentation of the evidence on behalf of the State. We
24 will proceed until the State has rested in the penalty phase
25 of the trial, but not later than 3:00 p.m. on Wednesday.

1 I do not want, Mr. Davis, you or Ms. Miller to
2 interpret the jury's decision as to saying you have only
3 until 3 o'clock.

4 MR. DAVIS: Yes, sir.

5 THE COURT: Mr. Jones and his contingent will
6 be leaving -- the bus will be leaving at 5:30 on Wednesday
7 night. Two and a half hours will give him sufficient time,
8 he says, to go home, take a quick shower, change clothes, get
9 to the bus.

10 We will then resume the trial wherever we are,
11 whether the State has rested or not rested, 9:00 a.m. on the
12 27th of June. And it is the unanimous decision and desire of
13 the jurors to work 27th, 28th, 29th, and 30th, that Saturday.
14 So I am alerting counsel for both sides to be anticipating a
15 possible Saturday work day.

16 Stand in recess, resume tomorrow morning 9:00 a.m.

17 (Recess of proceedings.)
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Reporter's Certificate

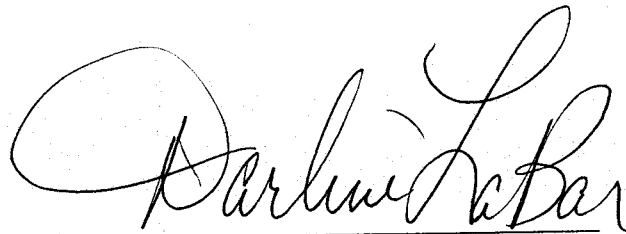
STATE OF TEXAS:

COUNTY OF DALLAS:

I, Darline W. LaBar, Official Court Reporter of the 194th Judicial District Court, in and for Dallas County, Texas do hereby certify that the foregoing volume constitutes a true, complete and correct transcript of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in the statement of facts, in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

Witness my hand this the 29th day of October, A.D., 2001.



DARLINE W. LABAR
Official Court Reporter
194th Judicial District Court
Dallas County, Texas
(214) 653-5803

Certification No. 1064 Expires December 31, 2002